DOCUMENT RESUME

ED 323 462 CG 022 785

AUTHOR Remley, Theodore P., Jr.; And Others
TITLE Ethical & Legal Issues in School Counseling. Chapter 3: Legal Issues.
INSTITUTION American Association for Counseling and Development, Alexandria, VA.
PUB DATE 88
NOTE 66p.; For parent document, see CG 022 782.
PUB TYPE Collected Works - General (020)

EDRS PRICE MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS Child Abuse; Confidentiality; Counselor Role; Elementary Secondary Education; *Ethics; *Legal Responsibility; *School Counseling

ABSTRACT

This document contains chapter 3 (7 articles) of a collection of 35 articles primarily from American Association for Counseling and Development (AACD) publications on the most important legal and ethical topics about which all school counselors need to be informed. "The Law and Ethical Practices in Elementary and Middle Schools" (Theodore P. Remley, Jr.) explores the differences between legal and ethical standards. "Counselor Contact of the Noncustodial Parent: A Point of Law" (Helen Aiello and Charles W. Humes) examines school policies regarding the rights of custodial and noncustodial parents in relation to access to children's school records. "The Hatch Amendment: A Primer for Counselors. Part II: Protective Legislation and Recommendations for Action" (Leslie S. Kaplan and Kevin Geoffroy) clarifies the areas of school activity affected by the Hatch Amendment. "The Counselor and Testing: Some Legal Concerns" (Lou Culler Talbutt) summarizes case law and ethical standards regarding school testing programs. "Libel and Slander: A Potential Problem for the 1980s" (Lou Culler Talbutt) examines the laws of libel and slander and warns school counselors to avoid common violations. "Current Legal Trends Regarding Abortions for Minors: A Dilemma for Counselors" (Lou Culler Talbutt) explains laws regarding abortions for minors. "Counselor Liability and the Duty to Warn: Selected Cases, Statutory Trends, and Implications for Practice" (Barbara Herlihy and Vernon Lee Sheeley) reviews court cases and statutes pertaining to the duty to warn. (NB)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED323462

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

☐ This document has been reproduced as received from the person or organization originating it.
☑ Minor changes have been made to improve reproduction quality.

3 • Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

"PERMISSION TO REPRODUCE THIS MATERIAL IN MICROFICHE ONLY HAS BEEN GRANTED BY

Mark Hamilton

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

LEGAL ISSUES

Legal standards of practice are different from ethical standards. Remley (1985) explores the differences and comments on the legal implications of confidentiality, court testimony, and counseling malpractice. He provides specific recommendations for school counselors who seek to practice in an ethical manner within the law.

Many schools have policies that differentiate between the rights of custodial and noncustodial parents, and school counselors often are required to implement such policies. The law is clear that, barring a specific court order to the contrary, noncustodial parents have all rights regarding their children except the right to have custody of the children permanently in their homes. Aiello and Humes (1987) explore the background and reasoning behind this legal concept in relation to access to children's school records.

When federal legislation known as the 1978 Hatch Amendment was passed and revised regulations were issued in 1984, a great deal of misinterpretation occurred that inhibited the offering of school counseling services. Eventually it was realized that the amendment's requirement of written parental consent for children to participate in certain school programs covered only a narrow range of activities that were federally funded, were experimental in nature, and involved psychological tests or treatment. Kaplan and Geoffroy (1987) clarify the areas of school activity affected by the Hatch Amendment, and recommend actions for school districts and school counselors in order to comply with this federal mandate.

School counselors often play a major role in administering the school's testing program. Rather than simply giving tests that are

CG022785

selected and scheduled by administrators and then posting the scores in students' records, school counselors also should provide expert advice to school policymakers regarding the appropriate use of tests. Counselors should assist in evaluating each test to determine whether it discriminates in any way against any segment of the school population; whether the test is valid and reliable; whether it is appropriate for the purposes for which it is being used; and whether the test is necessary to achieve the school's objectives. Moreover, the counselor is responsible for helping students to understand the nature and purposes of tests and to interpret test results for students in a clear and understandable manner. Talbutt (1983, in "The Counselor and Testing . . .") summarizes some of the case law and the ethical standards regarding school testing programs.

Because school counselors have access to confidential information about children, there is always a danger that a counselor might disclose some details that might cause embarrassment to students or their families. If a school counselor were to disclose confidential information inappropriately and a student were harmed in some way as a result, the student could bring legal action against the counselor for defamation of character. Talbutt (1983, in "Libel and Slander . . .") sets forth the basis for the law of libel and slander and warns school counselors to avoid common violations.

Even as this book is being printed, the laws regarding abortions for minors are changing. Talbutt (1983, in "Current Legal Trends . . .") gives a background of the laws in effect prior to publication of her article, and discusses implications for school counselors. Generally, school counselors may discuss a student's decision of whether to seek an abortion with the student, but they should also encourage parental involvement when possible. Each case must be decided individually based on the facts as presented.

Herlihy and Sheeley (1988) review relevant court cases and statutes pertaining to "the duty to warn," and they offer advice regarding clients who could be contemplating violence against others. Although the authors suggest guidelines and a decision-making model, school counselors must realize that ultimately they will be required to exercise their own professional judgment as to whether a client poses a real threat to another person.

The Law and Ethical Practices in Elementary and Middle Schools

Theodore P. Remley, Jr.

Although *law* and *ethics* are often mentioned in the same breath, they are separate concepts that need differentiation to be fully understood. Elementary and middle school counselors must understand basic ethical and legal issues to function effectively in their school settings.

Ethical standards are the rules of practice set forth by a profession. Such standards tend to be general and idealistic, seldom answering specific questions for the practitioner. Elementary and middle school counselors seek guidance from the *Ethical Standards* of the American Association for Counseling and Development (AACD, formerly American Personnel and Guidance Association [APGA]) (APGA, 1981) and the *Ethical Standards for School Counselors* (1984) of the American School Counselor Association (ASCA). The AACD and ASCA standards do not address every foreseeable professional dilemma, but they do provide professional counselors with a general framework for making sound ethical decisions regarding their behavior.

Laws, on the other hand, are the standards of behavior a society demands of its members. Laws set forth the rights of citizens and usually define minimal acceptable behavior rather than idealized expectations. There are three basic sources of law: constitutions, statutes, and common law. Constitutions and statutes are passed by state and federal legislative bodies, and common law is inherited from our English ancestors and accepted as the traditional standard of behavior in the United States. The judiciary interprets constitutions, statutes, and the common law and, as a result, often changes the practical application of laws through its decisions.

To practice counseling in a professional manner, elementary and middle school counselors must know and abide by the AACD and ASCA ethical standards. To ensure that they are not abridging

the rights of others and that they are abiding by the rules society has set forth, counselors must also have some knowledge of the law.

Unfortunately, ethical and legal standards sometimes disagree in areas such as confidentiality, thus presenting conflicting approaches to the same issue. If a counselor is aware of ethical and legal standards, however, sensitive and potentially explosive situations usually can be resolved in everyone's best interest.

It is impossible to cover comprehensively all the legal issues related to elementary and middle school counseling. As a result, three important topics that involve legal and ethical issues have been chosen for analysis: (a) confidentiality and privileged communication, (b) the counselor as a witness in court proceedings, and (c) counselor malpractice.

Confidentiality and Privileged Communication

Counselors have an ethical responsibility to keep confidential their communication with clients. This simple statement is not so easy, however, for elementary and middle school counselors to put into practice.

Legal Status of Children

Children occupy an unusual position in our legal structure. Although they are guaranteed some of the same protections adults are guaranteed, in many respects the protection of their individual rights depends on the interpretations of those rights by their adult parents or guardians. Before the 19th century children were treated under the law as property of their parents and owed their parents total subservience (Pappas, 1981). A 1979 U.S. Supreme Court decision declared:

> We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing. (*Bellotti v. Baird*, 1979)

Some legal experts have argued that each child's capacity to make sound decisions should be evaluated before the right to make de-

cisions is given to the parents (Batey, 1982; Eglit, 1981). Despite this proposition, the prevailing view in our society is that children under the age of majority do not have the capacity or right to make decisions for themselves.

Because of the special status of minors in our society, professionals who work with children feel obligated to involve significant adults in the therapeutic or counseling process. For example, elementary and middle school children may lack the maturity or capacity to solve problems on their own; therefore, counseling these children often involves additional consultation with adults who are important in the child's life. Parents, guardians, siblings, other relatives, teachers, and friends may become clients, consultees, or consultants of the elementary or middle school counselor as a result of a child's presenting problem.

Guidelines for Confidentiality

To whom do counselors owe the ethical obligation of confidentiality? Even the youngest child who becomes a client in the elementary or middle school is entitled to some privacy in a counseling relationship. Cooper and Wanerman (1977) suggested that exact comments of children should not be disclosed to adults and the counselor's impressions should be conveyed with discretion. To be sure that they are fulfilling their confidentiality responsibilities to children who are clients, counselors can take the following steps:

1. Always inform the child before another person is consulted regarding the child's problem. The child's consent is desirable but not always necessary.
2. Try to involve the child in the decision-making process once adults are contacted. Avoid taking actions that may create for the child a feeling of betrayal by the counselor or other involved adults.
3. Keep the child informed of decisions as they are made.

Parents and guardians of children often assume the status of clients when they are contacted by the elementary or middle school counselor regarding a child's problem. Seldom does the counselor simply inform the parents or guardians of a problem and then withdraw from the process. School counselors may even find themselves involved with the family in a counseling relationship. Certainly, parents and guardians expect privacy when they discuss

their family problems with an elementary or middle school counselor.

With only one obvious exception, counselors should never voluntarily disclose information gained in a counseling session with a family unless the family has consented to such disclosure. The exception is a situation in which the counselor feels someone is in "clear and imminent danger" (See Ethical Standard B4, APGA, 1981).

The elementary or middle school counselor must decide whether the child who is the client or someone associated with the child is in danger (Ferris and Linville also discuss this counselor decision in *Elementary School Guidance and Counseling, 19*, 1985). If danger exists, the counselor is obligated, according to the Ethical Standards (APGA, 1981), to disclose the danger to appropriate authorities. If a counselor is not sure whether a clear danger exists, he or she should consult colleagues in a professional manner before making any disclosures. Many states have statutes requiring counselors to disclose *suspected child abuse*, but fail to define the term. Thus, counselors must use their professional judgment. Because of their training, professional counselors are competent to determine whether a party is in danger or whether a child might be the victim of abuse. Before disclosures of confidential information are made, however, counselors must be clear about their reasons for disclosure so they can defend their decisions if necessary at a later time.

The obligation to keep confidential the information about a child's problem that is gained in interactions with other adults seems to vary according to the circumstances. Teachers and principals probably would not expect their conversations regarding a child's problem to be confidential if they are involved in the child's problem only as consultants. Relatives of the child or others who have been identified as closely involved with the problem a child is experiencing, however, probably would expect the counselor to keep their communications confidential.

Privileged Communication

If an interaction is designated as privileged communication under the law, a judge may not force the professional involved to disclose what was said by a client in an interview. Many counselors are hesitant to assure clients that their interactions are confidential because they realize that in most states communications between

elementary or middle school counselors and clients are not legally privileged. Under common law only attorney-client interations were privileged. By statute the legal privilege has been extended to communications with physicians, clergymen, psychologists, social workers, and other mental health professionals. The statutes vary from state to state regarding which relationships are privileged. As reported in a recent survey of ASCA state presidents, only 14 states (California, Idaho, Indiana, Kentucky, Maine, Michigan, Montana, Nevada, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, and South Dakota) have enacted statutes making the interactions between school counselors and clients privileged (Cummings, 1983).

The lack of a statute making confidential the communication between elementary or middle school counselors and their clients in no way affects the counselor's ethical responsibility to keep confidential almost all communications with clients (Corey, Corey, & Callanan, 1979). It is appropriate to assure clients that their interactions with school counselors are confidential, even though there are some exceptions. Only in rare situations must the counselor either take action because clients may be dangerous to themselves or others or disclose the content of communications in a court of law.

Middle school counselors often wonder what their legal responsibilities are to parents when they work with minors regarding issues such as birth control and abortion. The U.S. Supreme Court has held that minors may receive birth control and abortions without parental consent (*Belloti v. Baird*, 1979; *Carey v. Population Services International*, 1977; *Planned Parenthood v. Danforth*, 1976). Although parental consent is not necessary under the law, school counselors must help their clients who are minors decide whether parents or guardians should be involved in birth control or abortion decisions. In such situations, counselors must keep in mind their responsibility to disclose potential dangers to their clients or others if they determine that such dangers exist. Counselors have no legal obligation to inform parents when their clients who are minors indicate their use of birth control, disclose a pregnancy, or discuss an abortion decision. If they do not disclose these situations to parents or guardians, however, these counselors must be ready to defend their decisions that their clients were mature enough to make such decisions without parental involvement and that no clear danger existed for the minors.

Counselors in elementary and middle schools often must involve adults in the problems of their clients who are minors. As a result, the child's expectation of privacy sometimes is outweighed

by the need to inform parents, guardians, or other adults. On the other hand, school counselors should keep as confidential as possible details of interactions with their clients who are minors. They also should recognize that some adults involved in a child's problem have expectations of privacy identical to those of the client. Although the child's rights are the primary concern, it is important for counselors to make sure that no person's right to confidentiality is totally disregarded. In fact, because situations requiring disclosure of confidential information are rare, it is essential that the child's consent to disclose be secured whenever possible.

Court Testimony

Elementary and middle school counselors occassionally find themselves involved in the legal system as witnesses. There are a number of situations in which a counselor may appear in court. In a child custody case, elementary or middle school counselors can be subpoenaed by one of a student's parents to provide informational testimony regarding that parent's interaction with school authorities (Ruback, 1982). Also, counselors may have to testify in the prosecution of a parent or guardian accused of child abuse or in a civil challenge of the denial of a petition for a child to be placed in a costly special education program. These situations have been known to involve elementary and middle school counselors; there are numerous other possibilities.

Guidelines for Court Testimony

Elementary and middle school counselors who agree to testify at the request of a party in a case or who are forced through a subpoena to testify against their wishes should follow these guidelines:

1. Avoid discussing the case in casual conversations. Do not offer opinions regarding the merits of the case. Words spoken informally without careful consideration can be used against counselors during cross-examination.
2. Before the court date, attempt to speak either with the attorney representing the side that will be helped by your testimony or to the prosecutor who will be conducting the direct examination. Ask the attorney to review anticipated

questions in advance and to predict questions that might be asked during cross-examination by the opposing attorney.

3. When testifying, be as objective as possible. Relate facts without personal interpretations. If asked an opinion, you should state it freely but be prepared to give the reasoning behind the opinion. Try to relax. All the counselor must do in these situations is tell the truth in an objective manner.
4. If asked to disclose information that you consider confidential, turn to the presiding judge and request that you not be ordered to answer the question. Clearly state that the reason for your request is the importance of confidentiality in counseling relationships and the expectation of privacy the client had at the time the interaction took place. If ordered by the judge to answer the question posed, you should do so; otherwise you can be held in contempt of court and fined or jailed. If you believe that answering such a question would breach an ethical obligation to a client, ask the judge for an opportunity to consult with an attorney.

Expert Witness Issues

In rare cases an elementary or middle school counselor may be asked to appear in a case as an expert witness. An attorney might be interested in such areas of expertise as general child growth and development, effective parenting, emotional needs of children, or standardized testing. Unless counselors are very secure in their knowledge of these areas, they probably should decline requests to appear as expert witnesses. There are many professionals with outstanding educational and experiential expertise in these areas. School counselors should be aware that any expert testimony they give can be challenged by someone with the same or more credibility as an expert.

The credentials of an expert witness are often questioned very closely. Questions may be asked regarding the number of courses taken in the field, whether other professionals know more about the topic, and the witness's specific experiences related to the case. In addition, extensive knowledge of specific subject matter is expected of an expert witness. In most cases the opposing attorney will call an equally or better qualified expert witness to refute testimony given by the first expert witness. Unless elementary and middle school counselors are unusually knowledgeable about a given topic, they will have a difficult time during cross-examination at-

tempting to answer detailed questions that are designed to destroy the counselor's credibility as an expert.

Malpractice

Malpracftice occurs when a professional is guilty of negligent practice (Beis, 1984). Although some professionals are plagued by malpractice suits, school counselors and other mental health professionals and educators are seldom sued (Halleck, 1979). There are few appellate court cases involving school counselors (Burgum & Anderson, 1975). This lack of litigation, however, should not lead elementary and middle school counselors to assume they are immune from such suits.

Elements of Malpractice

For a plaintiff to bring a successful malpractice suit against a professional, the individual must be harmed either physically or emotionally, and the harm must be the direct result of a negligent action or an omission by the professional. For example, elementary or middle school counselors may be sued for malpractice if they fail to notify parents of self-destructive actions being taken by a child, if they compromise someone's reputation in the community by breaching the ethical standard requiring confidentiality, or if they fail to refer a child with deep emotional problems to a psychiatrist or psychologist. These three examples illustrate how varied the allegations may be in malpractice litigation.

To be successful in malpractice suits, plaintiffs must prove through evidence (a) that someone (the plaintiff or perhaps the child of the plaintiff) was harmed, (b) that this harm was the direct result of a counselor's negligent action or omission, and (c) that other counselors practicing in a similar community would not have handled the situation in the same manner.

Preventive Measures

Malpractice suits should not be a major concern for elementary and middle school counselors, but counselors should take preventive measures that are congruent with the current ethical standards (APGA, 1981). Such measures include:

1. Knowing their job descriptions and not deviating significantly from them in their daily work; revising a job de-

scription if it does not reflect current responsibilities or practices.
2. Knowing the AACD and ASCA ethical standards and practicing according to those standards.
3. Consulting with other professionals before acting when difficult legal or ethical situations arise.
4. Attending workshops and conferences to stay informed of current developments in the counseling field.

Most elementary and middle school counselors are either immune from malpractice suits because they are employed by a governmental agency or are covered for malpractice damages by insurance purchased by their schools (Schutz, 1982). Counselors should know whether their schools have such insurance policies and should find out the exact language in the document. As a safety measure, in case the school counselor is exempt from coverage for some reason or in the event the limits of the school policy are exceeded, school counselors should purchase individual professional liability insurance. AACD offers its members the opportunity to participate in a relatively inexpensive group professional liability policy. Counselors who are supervising counselor trainess should insist that these students also purchase liability insurance before beginning their practicum or internship. If these supervisory activities are not a part of a counselor's actual job description, individual professional liability insurance for both parties is essential.

Conclusion

Professional elementary and middle school counselors must be committed to ethical and legal practices. Because ethical standards are much more idealistic than legal standards, the counselor who knows and abides by the rules of practice established by the profession will have little difficulty staying within the law.

Elementary and middle school counselors should keep all client interactions confidential except in a few specific instances. If the counselor relationship is to be effective, clients must be assured of confidentiality so they can feel free to talk openly.

If it is necessary for a school counselor to testify in court, he or she should be as honest and objective as possible. As a witness, the counselor's only obligation is to tell the truth. Elementary and middle school counselors should carefully consider requests to serve as expert witnesses, declining such offers if they do not feel exceptionally well qualified.

Although malpractice is not a major threat to elementary school counselors, they still should take a number of steps to avoid situations in which malpractice suits might be successful. Practicing within their job descriptions, adhering to ethical standards, and keeping informed of current developments in the professional field can help counselors avoid malpractice litigation.

Counseling children necessarily involves adults. Elementary and middle school counselors must be careful to balance the interest of all people involved. There are no specific ethical standards and few laws that tell a counselor when to disclose to an adult information given by a child, how to work with adults with different interests (such as divorcing parents), or how to determine when an adult should be consulted without a child's consent. The recently adopted ASCA *Ethical Standards for School Counselors* (1984) are very helpful, however, and should be reviewed. Because many issues raise questions of judgment, consultation with more experienced counselors or with other peers may be beneficial in resolving dilemmas. Fortunately, most elementary and middle school counselors can face difficult issues successfully and make positive, informed decisions without guidelines that tell them exactly what to do in all possible situations.

References

American Personnel and Guidance Association. (1981). *Ethical standards*. Falls Church, VA: Author.

American School Counselor Association. (1984). *Ethical standards for school counselors*. Alexandria, VA: Author.

Bates, B. (1982). The rights of adolescents. *William and Mary Law Review, 23*, 363–384.

Beis, E. B. (1984). *Mental health and the law*. Rockville, MD: Aspen Systems.

Bellotti v. Baird, 443 U.S. 622 (1979).

Burgum, T., & Anderson, S. (1975). *The counselor and the law*. Washington, DC: American Personnel and Guidance Association Press.

Carey v. Population Services International, 431 U.S. 678 (1977).

Cooper, S., & Wanerman, L. (1977). *Children in treatment*. New York: Brunner/Mazel.

Corey, G., Corey, M.S., & Callanan, P. (1979). *Professional and ethical issues in counseling and psychotherapy*. Monterey, CA: Brooks/Cole.

Cummings, K.E. (1983). *Survey of the status of school counselor privileged communication statutes*. Unpublished report, American School Counselor Association, Alexandria, VA.

Eglit, H. (1981). Of age and constitution. *Chicago Kent Law Review, 57,* 859–914.

Halleck, S.L. (1979). Malpractice in psychiatry. In S.L. Halleck (Ed.), *New directions for mental health services no. 4* (pp. 111–161). San Francisco: Jossey-Bass.

Pappas, A.M. (1981). Introduction. *Columbia Human Rights Law Review, 13,* xxvii-lv.

Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

Ruback, R.B. (1982). Issues in family law: Implications for therapists. In J.C. Hansen & L.L. L'Abate (Eds.), *Values, ethics, legalities and the family therapist* (pp. 100-120). Rockville, MD: Aspen Systems.

Schutz, B.M. (1982). *Legal liability in psychotherapy.* San Francisco: Jossey-Bass.

Counselor Contact of the Noncustodial Parent: A Point of Law

Helen Aiello and *Charles W. Humes*

A persistent issue confronting elementary school counselors is clarification of the noncustodial parent's status regarding access to a child's educational records in the absence of a specific court order or other restraint. The issue becomes a real concern with the passage of the 1974 Family Rights and Privacy Act (FERPA), commonly known as the Buckley Amendment. This federal legislation, part of the sweeping due process reforms of the 1970s, brought public attention to the problem of maintaining and gaining access to records (Gibson, Mitchell, & Higgins, 1983; Hummel & Humes, 1984). The law and regulations do define important terms such as *parent*, *custody*, and *court order* ("Privacy Rights," 1980), but there is room for interpretation, particularly regarding the ethics of confidentiality (Remley, 1985).

During the past decade much has been written about the law and its regulations, with an entire issue of *Elementary School Guidance & Counseling* (Larrabee & Terres, 1985) devoted to the topic. The law and regulations, however, do not address the issue of whether a school counselor, with good reason, may contact a noncustodial parent to share information without notifying the custodial parent. Obviously, this is a highly charged emotional issue and can engender both rancor and litigation. The answer to the dilemma may be found in case law. These points interpret the law and regulations through judicial decisions. An actual case is presented below, including the question posed, a statement of facts, the issues, and a conclusion.

Question

Should a counselor contact a noncustodial parent when the records are devoid of a court order or other document prohibiting

such contact and when the counselor's best professional judgment indicates such contact be made?

A divorced mother has custody of twin daughters enrolled in an elementary school. The father has visitation rights. There is a history of conflict between the mother and the twins, conflict centered around the mother's restrictive notion of discipline and a preoccupation with grades. A recent incident was the basis of the twins seeking counseling intervention. Thereafter, they sought frequent counseling and guidance. Their academic records revealed that grades and behavior were suffering.

A referral from a teacher and the counselor's observation of their depressed states prompted a referral to a social worker. The counselor suggested a call to their mother. The twins begged the counselor not to do so. Instead, they asked that their father be called because it was his weekend to have the girls. A careful examination of their file indicated no court order or other paper prohibiting such contact. The father's name and work and home telephone numbers were included on the emergency care card. The counselor consulted with the supervisor, the school's guidance director, and the social worker, and they all agreed that a call to the father was in the children's best interest. Thereafter, the social worker called the father to suggest a conference with both parents.

The counselor called the mother, who became enraged when she learned the father had been contacted. In her view the school acted improperly by contacting the father before contacting her and by not seeking her permission to contact the father. She refused to allow the school representative to meet with the father with or without her.

Issues

The issues in this point of law are:

1. Do both parents have equal access to school records?
2. Does the noncustodial parent have access to school records and the right to be included in conferences?
3. When it seems to be in the child's best interest to contact the noncustodial parent, is the school obligated to notify the custodial parent before doing so?
4. When information gleaned during the counseling relationship indicates the noncustodial parent should be contacted, what is the obligation of the counselor?

Issue No. 1: Equal Access to School Records

Access to school records in school districts that are receiving federal funds is governed by the regulations that implement Public Law 93-380, the FERPA (1974). This act states, in general, that each parent has equal access to the child's educational records. The federal regulation that implements FERPA is quite clear:

> An educational agency or institution may presume that either parent of the student has authority to inspect and review the educational records of the student unless the agency or institution has been provided with evidence that there is a legally binding instrument or a state law or court order governing such matters as divorce, separation or custody, which provides to the contrary. ("Privacy Rights," 1980, p. 30913)

In *Mattie T. v. Johnston* (1976), the Court pointed out that the FERPA does not prevent release of records to parents, but is aimed at preventing release of records to unauthorized individuals or organizations without the consent of the student or the parent. Thus, it is clear that either parent of a student has access to the records of that student, in the absence of a court order or other official instrument prohibiting that access.

Issue No. 2: Access for the Noncustodial Parent

In only a few cases have the federal statute and regulations been interpreted. These cases involve the noncustodial parent seeking the records of the child. In *Page v. Rotterdam-Mohonasen Central School District* (1981), the Court held that when the natural father and mother were living apart under terms of a separation agreement providing custody of the child to the mother and rights of visitation to the father, the father was entitled to inspect and review the educational records of the child even though the natural mother had signed a statement, prepared by school officials, indicating that she did not authorize the school district to transmit such records to the natural father. The Court reasoned that the presence of the signed statement did not constitute the kind of barring document specified in the statute and regulations as would prohibit the school district from permitting the noncustodial parent to review the records or attend conferences with designated school employees.

A recent issue of *A Legal Memorandum* (Punger, 1984) issued by the National Association of Secondary School Principals, carried a reprint article on the topic and stated that some educators incorrectly believe that the custodial parent can legally control access to their child's educational records and can prevent the noncustodial parent from seeing them.

The Court pointed out in *Page v. Rotterdam-Mohonassen Central School District* (1981) that a noncustodial parent has not abandoned the child simply by reason of noncustody. And, although legal custody may be given to one or both of the parents, the fact that it is given to one does not necessarily terminate the role of the other as a psychological guardian and preceptor (*Weiss v. Weiss*, 1981).

Another reason for protecting this relationship is that the noncustodial parent is presumably entitled to custody after the death of the custodial parent. In *People ex rel Moffet v. Cooper* (1970), the Court in this case explored the concept of the welfare of the child, which is the foundation on which the question of access turns. The Court held that it is important for the noncustodial parent to be informed so as not to be be ill-prepared in the event that he or she were suddenly cast into a custodial role after the death of the custodial parent. Even if the noncustodial parent has been denied visitation rights (which is not the case here), the parent probably would not lose access to school records. As a practical matter, visitation rights and access to records are separate rights and privileges.

Obtaining access to school records need not involve direct contact with the child, and it may be the only means available for the noncustodial parent to follow the child's growth and development. In the absence of a specific statement in the court order denying the noncustodial parent the right of access to school records, the general rule should remain in effect (Punger, 1984).

Issue No. 3: Contacting Custodial or Noncustodial Parents

Although it is held that custody carries the right and obligation to make decisions regarding a child's education, noncustodial parents can obtain information about the child's development as a student, as seen in *Page v. Rotterdam-Mohonasen Central School District* (1981). The FERPA specifically states that funds shall not be available to educational agencies that deny to parents the right

to inspect and review the educational records of their children. The regulation implementing the FERPA allows inspection by either parent regardless of custody, unless access is barred by state law, court order, or legally binding instrument ("Privacy Rights," 1980).

In *Page v. Rotterdam-Mohonasen Central School District* (1981), the Court pointed out that educators and school districts are charged with the duty to act in the best educational interests of the children committed in their care. Those interests dictate that educational information be made available to both parents of every school child who has two parents interested in the child's welfare. In *Weiss v. Weiss* (1981), the Court regarded the welfare and best interests of the child as being predominant in any contest involving the rights of the parents.

> Where the physical and emotional well-being of a child is involved, it is, at best, anomalous that its protection should be dependent on the vindication of the "rights" of the parents. Again, this view does not lose sight of the fact that while legal custody may be in one or both of the parents, the rights of the custodial parent are subservient to the primary right of the child to have the other as a psychological guardian and preceptor. (*Weiss v. Weiss*, 1981, p. 214)

It seems clear that case and statutory law allow the noncustodial parent access to the records of the child, and the welfare of the child is the predominant consideration by those charged with its care (including the school); therefore, when the professional judgment of the school representative so indicates, it is not only permissible but the duty of that representative to contact the noncustodial parent. Under these circumstances there can be no requirement to notify first the custodial parent.

Issue No. 4: Counselors' Obligation of Notification

Section B.4 of the *Ethical Standards* of the American Association for Counseling and Development (AACD) states:

> When the client's condition indicates that there is a clear and imminent danger to the client or others, the member must take reasonable personal action or inform the responsible authorities." (AACD, 1981, p. 1)

The California Supreme Court in *Tarasoff v. Regents of the University of California* (1974) held that a counselor, or a person in such a relationship has a duty to warn a person who is in danger. The Court stated that privileged communication between a psychotherapist and client must yeild to disclosure when someone is in danger. Consultation with other professionals must be used when possible.

School counselors do not have privileged communication in most states (Hummel & Humes, 1984). Although counselors generally do not have this burden, they do have the ethical responsibility not to disclose confidential information obtained in counseling sessions. This responsibility must give way to the greater responsibility, noted above, to take reasonable personal action and to inform responsible authorities after careful deliberation.

In the case used here as an example, the clients—the children—were informed and consented to the revelation of the school-related information to the social worker and noncustodial parent. The counselor has a responsibility to act in the best interests of clients in the school setting, including making the appropriate referrals and contacting responsible authorities (AACD, 1981). In this case, the appropriate referral was to the social worker, and the responsible authority was the noncustodial parent.

Conclusion

Because public schools in all states accept federal funds, the FERPA applies. Hence, schools cannot deny to parents the right to inspect and review the educational records of their children. The applicable regulation ("Privacy Rights of Students," Federal Register, 1980) allows inspection by either parent without regard to custody, unless that parent is barred by one of the mechanisms mentioned in the regulation.

Case law indicates that the noncustodial parent has a right to review the child's record and attend conferences even when the custodial parent has attempted to forbid such interaction. Furthermore, the cases have held that the welfare of the child is of predominant concern over any rights of the parents.

Finally, it is clear that a counselor has an ethical obligation to contact responsible authorities, which could include the noncustodial parent, when the failure to do so might bring harm to another.

Counselors, educators, and school district officials are charged with the duty to act in the best educational interests of the children committed to their care. It is incumbent on them, when the best interests of the child clearly indicate such, to contact either the custodial or noncustodial parent as the judgment of school representatives indicates. It would be detrimental to the welfare of the child if access to the noncustodial parent were denied in such cases.

References

American Association for Counseling and Development. (1981). *Ethical standards*. Alexandria, VA: Author.

Family Rights and Privacy Act of 1974, §512, 20 U.S.C. §1232g (1974).

Gibson, R.L., Mitchell, M.H., & Higgins, R.E. (1983). *Development and mangement of counseling programs and guidance services*. New York: Macmillan.

Hummel, D.L., & Humes, C.W. (1984). *Pupil services: Development, coordination, administration*. New York: Macmillan.

Larrabee, M.L., & Terres, C.K. (Eds.) (1985). Special focus on ethical and legal issues [Special issue]. *Elementary School Guidance & Counseling, 19*(3).

Mattie v. Johnson, 74 F.R.D. N.D. (MS 1976).

Page v. Rotterdam-Homonasen Central School District, 441 N.Y.S. 2d 323, 109 Misc. 2d 1049 (NY 1981).

People ex rel Moffett v. Cooper, 63 Misc. 2d 1005, 314 N.Y. 52nd, 248 (NY 1970).

Privacy rights of parents and students. (1980, May 9). *Federal Register, 45*, 30913–30918.

Punger, D.S. (1984, September). The nontraditional family: Legal problems for schools. *A Legal Memorandum*, pp. 1–8.

Remley, T.P. (1985) The law and ethical practices in elementary and middle schools. *Elementary School Guidance & Counseling, 19*, 181–189.

Tarasoff v. Regents of University of California, 529 P 2d 533 (CA 1974).

Weiss v. Weiss, 52 N.Y. 2d 170, 418 N.E. 2d 377 (NY 1981).

The Hatch Amendment: A Primer for Counselors

Part II: Protective Legislation and Recommendations for Action

Leslie S. Kaplan and *Kevin Geoffroy*

In Part I of "The Hatch Amendment: A Primer for Counselors" (Kaplan & Geoffroy, 1987) we examined the historical antecedents of parental consent for students' education. In this part we explore the legislative decisions concerning parental versus state control of education and suggestions for counselors and educators.

Relationship of Current Litigation to the Hatch Amendment

The Hatch Amendment regulations have yet to be challenged by litigation, but a look at relevant precedents may provide a context for how such a challenge might be received by the courts.

Parental Rights

The U.S. Constitution protects parents' rights to raise their children. In 1923 the U.S. Supreme Court recognized that parents have a constitutional right to "establish a home and bring up children" (Dittersdorf, 1983–84, p. 592). Although the constitutional source of this right is unclear, the modern court has consistently reaffirmed the constitutional right of child rearing, citing as support the 14th Amendment's guarantee of due process (*Meyer v. Nebraska*, 1923; *Pierce v. Society of the Sisters of the Holy Names of*

22

Jesus and Mary, 1925) and the Bill of Rights (*Roe v. Wade*, 1973) or generally citing the right of privacy derived from these sources (Runyon v. McCrary, 1976).

Plaintiffs must be able to identify and articulate the parental interests burdened by the activity or curriculum in question if courts are to uphold their claims (Dittersdorf, 1983–84). In *Moody v. Cronin* (1979) parents successfully defended their right to have children excused from coeducational physical education classes, which the court ruled interfered with the Pentecostal Christian parents' rights to teach their children the value of modesty. In *State of Wisconsin v. Yoder* (1972), the Supreme Court recognized a "cardinal consitutional right" of parenthood, which included control over a child's values (p. 234). Here the Supreme Court declared that teaching moral standards was an important American tradition that is constitutionally protected.

First Amendment Rights

The purpose of education in this country is to provide citizens with information and skills so they can draw conclusions from that information and make informed, intelligent judgments. Politically and economically, educated individuals act productively in their own as well as in the national interest. Gordon (1984) identified two basic methods of teaching values. The directive or prescriptive method involves transmitting information and accepted truths to passive students. The discursive or analytical method provides an active examination of data by both teacher and student, who present, discuss, and analyze the moral, logical, and practical consequences of those values. The directive method is coercive indoctrination; the discursive method minimizes coercion and indoctrination.

In a diverse, complex society such as the United States it is difficult to identify a common set of values and beliefs that should be transmitted through the socialization process of schooling. Almost every value is objectionable to someone. Teaching religious values violates the Establishment Clause of the First Amendment. If there are essential, basic values in American society as a whole, they must be found in the Constitution: justice, promotion of general welfare, liberty, majority rule, individual autonomy, privacy, due process, and others (Gordon, 1984). The discursive method of teaching is compatible with First Amendment principles of minimal intrusiveness or coercion because it does not require students to

believe in the values taught. It does not restrict access to information, reward desired beliefs, or punish undesired ones.

All teaching involves choices of what and what not to teach. Curriculum choices reflect the values of local and state decision makers. The First Amendment protects access to information and ideas in the pursuit of a better understanding of reality and prohibits the government from requiring an individual to hold a particular understanding of reality or from controlling the general content of that understanding (Gordon, 1984). The ruling in *Board of Education v. Pico* (1982) demonstrates that the First Amendment prohibits a school board from removing books from the school library for the purpose of restricting access to the political ideas or social perspectives discussed in them. The government cannot restrict student access to information and ideas already available to them solely because it disagrees with the content of the information and ideas.

Proponents of a wider interpretation of Hatch regulations might attempt similar First Amendment challenges to present curricula and activities. Challenges against sex education on similar grounds have all been unsuccessful (Gordon, 1984). Implicit in the Establishment Clause is the value of secularism and the guarantee of free expression (Gordon, 1984). Courts have also rejected Establishment Clause challenges on the grounds that secularism is not a religion, as in *Citizens for Parental Rights v. San Mateo County Board of Education* (1975). Courts cannot impose a narrow, sectarian view of reality without violating free expression.

Furthermore, according to some views, the application of the First Amendment to public schools includes development as well as expression of ideas, beliefs, opinions, and world views (Gordon, 1984). In addition, *Mozert v. Hawkins County Public Schools* (1984) held that the First Amendment does not guarantee that nothing offensive to any religion will be taught in schools. The First Amendment does guarantee that state schools will be neutral on the subject of religion, neither advocating a particular religious belief nor expressing hostility toward any or all religions.

In the *Witters v. State Commission for the Blind* (1984) decision, the court determined that persons who claim violation of free exercise of religion must show the coercive effect of enactment as it operates against them in the practice of their religion. The challenged state action must somehow compel or exert pressure on the individual to violate a tenet of his religious belief.

In *Aguillard v. Edwards* (1985), it was held that the Establishment Clause does not require the public sector to be insulated

from all that may have religious origin or significance. In *Epperson v. Arkansas* (1969), a case that overturned an Arkansas law prohibiting the teaching of Darwinism in public school science classes, the Supreme Court declared that secular subjects that directly challenge certain religious views are permissible. The court could not permit certain religious sects to advance or prohibit information to reinforce their own beliefs in violation of the Establishment Clause. Finally, a New Jersey court held in *Smith v. Ricci* (1982) that a family life education program focusing on human sexuality in public elementary and secondary schools did not violate the Establishment Clause because it did not enhance any particular religious viewpoint nor did it favor a "secular" over a "religious" one.

In short, the First Amendment protects students' rights to receive information at school. Parents challenging "objectionable" curricula such as sex education or possible affective-psychological education, would not find judicial relief if they sought to restrict a child's access to information and ideas.

State Versus Parents' Rights

Even courses designed primarily to transmit information also transmit values. Simple openness about certain personal issues conflicts with the traditional values of privacy, intimacy, and modesty that many parents hold.

In addition, nonjudgmental discussions imply freedom of choice that is free of the moral restrictions to which parents still subscribe. Moreover, courses that support a pragmatic morality based on rational consideration of consequences conflict with the traditional stress on absolute moral and religious ethics. Thus, by teaching contrary values, schools interfere with parents' control over their children's moral development. Nevertheless, although school authorities may not attempt rigid indoctrination, they are charged with teaching values (Dittersdorf, 1983–84).

Freedom of choice for students, the opposite of indoctrination, allows a range of choices regarding attitudes and behaviors and permits consideration of the consequences of one's actions. Children can still consider the consequences of violating or conforming to their parents' beliefs and life-styles. It is the state's educational mandate to foster societal values of freedom of choice, and the state needs significant freedom to fulfill this task.

Although parents have the right to direct their children's upbringing and education, the parental right is not absolute. The

state has a substantial interest in the welfare of children, which may take priority over the rights of parents. In the area of education, the state serves as the primary protector of the child's best interests.

In *Prince v. Massachusetts* (1943) the court ruled that although the guardian had the right to teach her child values, these interests were outweighed by those of the state. In *Cornwell v. State Board of Education* (1969) the public health issue of teenage pregnancies predominated over the parents' wish to remove their children from a sex education class. In *Citizens v. San Mateo* (1975), *Hopkins v. Hamden Board of Education* (1971), and *Medeiros v. Kiyosaki* (1970), privacy claims have been unsuccessful in overcoming what courts have viewed as compelling state interests in public health. Parental rights have also given way to state interests in using audiovisual equipment. In *Davis v. Page* (1974) Apostolic Lutherans unsuccessfully sought to have their children excused from class during audiovisual presentations, claiming the equipment was immoral. Although parents' interests were recognized, the court ruled that the state's interest was primary. Parents' rights have also given way in the face of countervailing interests of the child (*Planned Parenthood v. Danforth*, 1976). It is apparent that parent, state, and child sometimes have competing interests in the child's welfare.

Questions of substantive due process are involved in deciding whether activities such as clarification of values or decision making are essential to fulfilling the educational goals of the state. In substantive due process cases, the courts have been willing to relinquish the premise that parents invariably act in their children's best interests. The courts continually evaulate the validity of contemporary values (Dittersdorf, 1983–84). For example, the court may override a parent's refusal to consent to an immature minor's request for an abortion if it determines that the surgery is in the child's best interests (*Bellotti v. Baird*, 1978).

Families who, unlike the Amish in *Wisconsin v. Yoder* (1972), do not wish to totally isolate their children from the American mainstream and who do not remove their children from public schools altogether, may find it difficult to press for heightened protection of family rights in the classroom. In any case, parents may argue that education about values invades their prerogative over family life-style by attempting to standardize instruction about value choices that are critical to the child's moral development. Such teaching may undermine American pluralism by countering parents' attempts to instruct their children (Dittersdorf, 1983–84).

The "captive audience" doctrine, by prohibiting the government from forcing an unwilling person to listen, protects the listener's privacy. It prevents a speaker from imposing his or her particular ideas and information about reality on the listener. This doctrine holds true for public school students who are compelled by attendance laws to be in school. Schools cannot force students to hear ideas that impose conformity, encourage intolerance, or present a factually skewed view of the world (Gordon, 1984). If school policies permit parents to limit or prevent their child's participation in a particular program, the court finds no interference with parental control (*Medeiros v. Kiyosaki*, 1970).

Although exemption from participation is an attractive alternative because it protects minority interests without burdening the majority, it does not completely satisfy state, child, or parent interests. Removed children are denied the benefits of the educational experience, thwarting the state's interest. A child removed from class by parents then risks unpleasant teasing by classmates. The Constitution requires the interests of all parties to be sensitively balanced. Nothing in the Constitution guarantees that the state will attain all its goals or that parents will have complete control over their children's education (Dittersdorf, 1983–84).

Finally, ultimate responsibility for management and control of programs in public schools rests with the state board of education (*Mills v. Buell*, 1985). States have the right to prescribe academic curricula for their public school systems. Therefore, the court of appeals exercises great care and restraint when called on to interefere in the operation of public schools (*Aguillard v. Edwards*, 1985). The Sweezy decision (*Sweezy v. New Hampshire*, 1957) calls into question state or federal laws prohibiting grants to school districts in which teachers teach courses that emphasize "secular humanism." The intensive scrutiny required to identify and rid the schools of secular humanism may result in an invasion of academic freedom or a "pall of orthodoxy" over the classroom, which courts will probably reject.

The Hatch Amendment Applied to Schools

Conclusions and Recommendations

Congress passed the Hatch Amendment in 1978, and the Department of Education issued formal regulations in 1984 ("Student Rights in Research," 1984, Parts III and IV). If broadly interpreted

and applied, these regulations could significantly hinder classroom teaching, education about values and affective education programs, teacher-student advisory programs, and counseling services available in public schools. Although active groups of conservative parents were influential in enacting their agenda in the initial legislation and the issuing of formal regulations, the educational profession was caught unaware and off guard. Now, as the conservative lobby agitates for a more restrictive interpretation and application of the Hatch regulations and seeks to intimidate school administrators by misrepresenting the scope and intent of the Hatch Amendment, professional educators are playing "catch-up" with their own occasional overstatement, public relations, and lobbying.

As written, the Hatch Amendment regulations are applicable in a limited number of cases. First, applicable programs must be fully supported by federal funds. Second, they must be experimental, used for demonstration activities or programs. Third, their primary purpose of testing or treatment must be to reveal personal information about students. All three conditions must be met before a program is covered by the amendment. If the educational lobby is to be effective, it will help keep the applicability to the present scope and work to contain the broadness of interpretation and application of the Hatch regulations.

At present, both sides are guilty of overstatement and "worst case scenarios." Educators are trying to stem the damage, to limit the definitions of "psychiatric and psychological testing, examination, and treatment," and to prevent additional restrictions on their abilities to educate youngsters. Conservative parents are working to widen the scope of the amendment's application according to what they view as Senator Hatch's real intent as evidenced by his *Congressional Record* remarks (1978) and their own goals. Senator Hatch, himself, is less than candid when he expresses his "amazement" at the uproar arising in both quarters in reaction to his amendment's regulations (*Congressional Record*, 1985). He was correct, however, when he commented, "Let the rule of common sense prevail" (p. S 1390).

The Hatch regulations constitute unfinished business. The regulations require more appropriate definitions and scope. Educators and the public at large can still affect the final wording of definitions. The regulations can clarify what is meant by "experimental" or "unproven." The definitions will markedly affect how broadly the regulations will be applied.

Next, the appeals process needs clarification. Do complainants need to exhaust or simply "touch base" with local and state officials

about their concerns regarding curriculum, programs, or activities in their schools before filing with the U.S. Department of Education?

In addition, school districts need to develop systemwide procedures for determining when written parental consent is required by Hatch Amendment regulations. Most schools already require such consent for assessment instruments (cognitive ability tests, personality and interest inventories, situation tests, and certain educational achievement tests) except for those routinely administered by local and state school districts. The Hatch regulations do not change these practices. When in doubt, it may be wise for schools to require written parental consent.

School divisions need to review the entire school curricula to see which programs or activities are fully supported by federal funds. If no federal monies are involved, the Hatch regulations do not apply.

School divisions should also determine which federally funded education programs and activities, if any, involve psychological or psychiatric examination, testing, or treatment in which the primary purpose is to obtain personal information in one or more of the seven areas designated. Furthermore, until the U.S. Department of Education becomes more specific in its own definitions, school divisions should develop a policy regarding what constitutes "psychological or psychiatric test, examination, or treatment" and decide who will determine this in case of confusion.

It is also advisable that school divisions develop, adopt, and publish a comprehensive policy to be used in setting criteria for selection of instructional materials and establishing procedures for handling parental complaints. The policy should apply to textbooks, library books, periodicals, and audiovisual materials. It should include a statement of the basic principles governing educational goals, curricular objectives, and responsibility and procedures for selection and reconsideration of materials. This statement of policy should spell out the role of guidance counselors and the state mandates under which they operate. Moreover, the policy should state the school division's commitment to academic freedom and include guidelines for treating controversial subjects in the classroom and for selecting outside speakers. It should also include appropriate forms to implement these policies and procedures. School personnel and parents should be informed of these policies and procedures.

Legally, although several complaints have been filed with the U.S. Department of Education, all have been judged invalid. Par-

ents' groups are trying to intimidate school officials into curtailing or dropping controversial programs by making oblique references to Hatch regulations in situations where they do not apply. The issue has not yet been litigated, but prior court decisions seem to support education that broadens alternatives and expands information available to pupils rather than restricting them. First Amendment and substantive due process issues support present curricular activities, education about values, affective education, teacher advisory programs, and other activities that involve personal issues and decision making. Parents' rights in their children's education and upbringing are legitimate, but states' interests in fully educating their young people override parental interests when necessary.

Going beyond the Hatch Amendment itself, the education profession has its own lesson to learn in contemporary political action. Educators must learn how to handle antagonistic pressure groups and how to activate and mobilize their own colleagues when political opportunities to enhance or protect their profession arise. Conservative groups have gathered supporters and have focused their attention on influencing legislation that affected education and subsequent regulations, which went completely unnoticed by professional educators. Educators also need better public relations, especially emphasizing the need for education "beyond basics." This need must be sensitively yet vigorously addressed as the social and personal purpose of education. Educators must also face and resolve the issues of misguided, misinformed, or just plain inept teachers and counselors who misuse their responsibility and act dogmatically or in ways that invade students' privacy.

The Hatch Amendment and regulations have awakened educators from their political naïveté. The regulations have alarmed educators who believed in their unquestioned right to teach what and how they pleased without any challenge from lay persons. Much has changed inside and outside the classroom. Challenges to educational practices from parents and organized groups will be a reality in the future. The Hatch Amendment has opened the eyes of educators to this phenomenon, and they must be aware of developing challenges that are certain to come in ensuing years.

References

Aguillard v. Edwards, 765 F 2d 1251 (C.A. 5, La. 1985)
Belloti v. Baird, 443 U.S. 622 (1978).

Board of Education v. Pico, 457 U.S. 853 (1982).

Citzens for Parental Rights v. San Mateo County Board of Education, 51 Cal. App.3d 12. 124 Cal. Rptr. 68 (1975).

Congressional Record. 95th Cong. 2d. Sess. 1978. Vol. 124, pt. 134.

Congressional Record. 99th Cong. 1st Sess. 1985. vol. 131, pt 15.

Cornwell v. State Board of Education, 314 F. Supp. 340 (U.S. Dist. Md. 1969).

Davis v. Page, 385 F. Supp. 395 (D. N.H. 1974).

Dittersdorf, N. (1983–1984). Public school sex education: Does it violate parental rights? *New York University Review of Law and Social Change, 12*, 591–616.

Epperson v. Arkansas, 393 U.S. 97, 89 S.Ct. 266 (1968).

Student rights in research, experimental activities, and testing. Proposed rule-making. (1984). *Federal Register*, Part III, Department of Education, 34 CFR, Pts. 75, 76, and 98, *49*, 6645–6650.

Student rights in research, experimental activities, and testing. Final rules with invitation to comment (1984). *Federal Register*, Part IV, Department of Education, 34 CRF, Pts. 75, 76, and 98, *49*, 35317–35322.

Gordon, Robert M. (1984). Freedom of expression and values inculcation in the public school curriculum. *Journal of Law and Education, 13*, 523-579.

Hopkins v. Hamden Board of Education, 29 Conn. Supp. 397, 289 A.2d (1971).

Kaplan, L.S., & Geoffroy, K. (1987). The Hatch Amendment: A primer for counselors. Part I. Development and implementation of the amendment by conservative parent groups. *School Counselor*, 35, 9–16.

Medeiros v. Kiyosaki, 52 Hawaii 436, 478 P.2d 314 (1970).

Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625 (1923).

Mills v. Buell, 685 S.W.2d. 561 (App. Ky. 1985).

Moody v. Cronin, 484 F. Supp. 270 (C.D. Ill. 1979).

Mozert v. Hawkins County Public Schools, 582 F. Supp. 201 (D.C. Tenn. 1984).

Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 45 S.Ct. 571 (1925).

Planned Parenthood v. Danforth, 428 U.S. 52 (1975).

Prince v. Massachusetts, 321 U.S. 158 (1943).

Roe v. Wade, 410 U.S. 113 (1973).

Runyon v. McCrary, 427 U.S. 160, 177, 178 (1976).

Smith v. Ricci, 89 N.J. 514, 446 A.R.2d 501 (1982).

State of Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526 (1972).

Sweezy v. New Hampshire, 354 U.S. 234, 77 S.Ct. 1203 (1957).

Witters v. State Commission for the Blind, 689 P.2d 53 (Wash. 1984).

The Counselor and Testing: Some Legal Concerns

Lou Culler Talbutt

Standarized tests have been misused in education. First, educators have often misinterpreted test results, which has resulted in discrimination against certain groups of students. Second, testing instruments themselves, standardized on samples of white middle class students, have discriminated against the emotionally disadvantaged, the handicapped, and racial minorities. Both misuses will be discussed throughout this article. Because school counselors are involved in testing, they should be familiar with some legal implications related to misinterpretation of test scores. This article summarizes significant laws and court cases pertaining to discrimination in educational testing, discusses their implications for counselors, and concludes with specific recommendations for counselors.

Legal Review

Public laws, as well as the courts, have addressed issues of discrimination in education. Public Law 93-380, the Elementary and Secondary Education Amendments of 1974, declared that all children have equal educational opportunities. Title IX of Public Law 92-318 denies federal funds to institutions engaged in sexual discrimination. Public Law 94-142 or the "Education for All Handicapped Children Act of 1975", was created to assure that all handicapped children have an appropriate public education. In *Brown v. Board of Education* (347 U.S. 483, 1954), the United States Supreme Court determined that when a state makes a public education available, "it is a right which must be made available to all on equal terms" (p. 493). McCarthy and Thomas (1977) identified

Pennsylvania Ass'n for Retarded Children (P.A.R.C.) v. Commonwealth (Pa., 343 F. Supp. 279, 1972) as the "first notable case involving the rights of handicapped children" (p. 77).

That court determined that no mentally handicapped student could be denied a public education or procedural due process of law. Then, in *Mills v. Board of Education* (D.C., 348 F. Supp. 866, 1972), that right to an education was expanded to those other than the mentally retarded. *Mills* (Supra) held: "Children who have been labeled as behavioral problems, mentally retarded, emotionally disturbed or hyperactive could not be denied a public education" (p. 866).

Historically, standardized test scores have been used in educational settings to place students and to identify them for special programs. Unfortunately, discrimination because of sex, race, and handicaps has resulted. The problem lies in the difficulty of classifying students correctly.

Test results have often been misinterpreted by educators. McCarthy and Thomas (1977) identified special education assignments as a crucial area because incorrect classification of a student could have harmful psychological effects (p. 82). In *Hoffman v. Board of Education* (410 N.Y.S. 2d 99, 1978), charges were brought against the Board of Education for placing a student of normal intelligence in a class for retarded students and permitting him to continue there for 11 years. The student was just below the cutoff point according to an intelligence test; thus, the school psychologists had recommended reevaluation within 2 years. The school board had failed to follow the recommendation. Although the lower court found the school board liable for damages, the court of appeals determined that the court should not interfere with the professional judgment of those involved in educational settings unless gross violations have occurred (424 N.Y.S. 2d 376). Even though many individuals would personally view the *Hoffman* case as an example of gross violation, the court upheld the traditional view that the courts should not interfere in academic decisions in educational settings unless absolutely necessary. The case, nevertheless, illustrates the harmful results of classifying a student with borderline test scores according to a single testing without the recommended follow-up tests. Hoffman also is a reminder to educators that legal charges for damages may be brought against school boards when students are misclassified.

Another form of test discrimination is racial. The courts have held that students may not be assigned to classrooms according to standardized tests when this method perpetuates segregated class-

rooms in recently desegregated schools. To use tests in this way is a violation of the 14th Amendment rights of Black students according to *Moses* v. *Washington-Parish School Board* (456 F.2d 1285, 409 U.S. 1013, 1972).

Testing instruments, themselves, lead to discrimination. In *Hobson* v. *Hansen* (D.C. 269 F.Supp. 401, 1967) the court rules that ability tracking in the District of Columbia "unconstitutionally deprived Negro and poor public school children of their right to equal educational opportunities" (p. 401).

The test produced inaccurate and misleading scores. Judge Wright in Hobson concluded that the aptitude tests used in tracking students have been "standardized primarily on and (were) relevant to a white middle class group of students" (p. 514). Students were actually being classified according to their socioeconomic and environmental influences, not their innate ability. In other words, unless a minority group has been represented in the norm group for the standardization of a test, bias against that minority group may exist. Kamin (1975) wrote: "Since its introduction to America, the intelligence test has been used more or less consciously as an instrument of oppression against the underprivileged—the poor, the foreign-born, and racial minorities" (p. 317).

Because tests may discriminate, students should not be classified or grouped solely on standardized and intelligence test scores. McCarthy and Thomas (1977) suggested that student placement be based on a substantial variety of data, not merely test scores. They wrote, "Anecdotal, historical records, direct observation, testing, and pupil-parent conferences" should be utilized (p. 51).

In a 1981 case, a federal appeals court emphasized the importance of test validity in competency testing. In *Debra P.* v. *Turlington* (644 F.2d 397, 1981) the court determined that a state could not "constitutionally so deprive its students (of their high school diplomas) unless it has submitted proof of the curricular validity of the test" (p. 400).

Also, the court determined that the failures of Blacks on the test may have been caused by the "unequal education they received" during the time of segregated schools (p. 407). Although competency testing is another whole category of testing and may be more of a legal concern for administrators, school boards, and test specialists than for counselors, it clearly illustrates the court's view that schools are expected to prove a test's validity when charged with discrimination.

Testing instruments also reflect sex discrimination. Donlon, Ekstrom, and Lockheed (1979) reported: "Bias in test is not only

demonstrated by statistical differences in test scores, but by the relative incidence of references to males and females" (p. 216).

In interpreting Title IX of Public Law 92-318, PEER (1975), the Project on Equal Education Rights, explained that counselors should use the same tests in evaluating students of different sexes. In a similar explanation, Virginia's Assistant Attorney General Ryland (1975) wrote: "If your placement procedures are getting most of the girls in home economics and most of the boys in shop, you have to make sure that your placement procedures are not inherently discriminatory" (p. 49).

Thus, Ryland recommended that boys and girls be given the same aptitude test. Ryland further explained that when aptitude tests show that all girls should seek traditional women's occupations, counselors should determine whether the tests are valid.

Counselors should also be aware that sex discrimination may occur in the counseling process itself or through other counseling materials. The *University of Pennsylvania Law Review* (1976) stated that discouraging a young girl from a certain career illustrates sex bias. In a study regarding career selection, Donahue and Costar (1977) found that high school counselors tended to view women in terms of occupations with less pay, less education, and more supervision than men. In another study involving 40 college freshmen women, Sauter, Seidl, and Karbon (1980) found that guidance counseling had influenced only those women who had selected traditional careers. They concluded, "Counseling experiences may propagate sex-typed career selection" (p. 247). Harway (1977) wrote that sex bias existed in college admission manuals, textbooks, occupational handbooks, and college catalogs. In a more recent study, Birk, Tanny, and Cooper (1979) examined over 2,000 illustrations from occupational information and detected sterotyping of women. Thus, counselors should note that discrimination occurs not only through testing instruments and the interpretation of tests but may occur through the counseling process and other materials as well.

This section has reviewed some of the laws and court cases that have dealt with discrimination in testing. Because counselors are involved in testing, it is important that they not misuse test results. The next section offers some practical recommendations for school counselors.

Recommendations

1. Counselors should be knowledgeable of their individual job responsibilities in testing; likewise, they should understand the

testing duties of psychologists, medical personnel, and administrators. In one study, for example, Talbutt (1979) indicated that school psychologists, not school counselors, were responsible for tests given in the evaluation of students for special education. A counselor, rather, might serve as a team member in classifying students. Counseling duties vary among states; Talbutt found that counselors could be responsible for interpreting test results for students, self-appraisal, conducting individual and group interpretation sessions for career development, using test results as a partial means of identifying students with special needs, and conducting individual and group interpretation sessions with parents.

2. Counselors should follow all regulations and guidelines from their state and local boards of education. Talbutt (1979) illustrated the type of information counselors might receive from these sources.

> (a) Administrators and teachers should especially be aware of the limitations of tests in terms of their validity, reliability, or predictability for minority students.
> (b) Test results alone should not be used to determine the program for a student or group of students.
> (c) Test results should not be used in a way that results in racial or socioeconomic violation of students.
> (d) Test results should not be used to exclude a student's participation in school-sponsored activities with the exception of honor societies. (p. 113)

3. Counselors should be familiar with and should follow their own professional guidelines. Both APGA *Ethical Standards* (1981) and *Ethical Standards of Psychologists* (American Psychological Association, 1973) address testing. The Ethical Standards (1981) recommends that counselors refer to the *Standards for Educational and Psychological Tests and Manuals*, revised edition, 1974, published by the American Psychological Association, the American Research Association, and the National Council on Measurement in Education regarding the preparation, publication, and distribution of tests.

4. Counselors should keep abreast of current testing information in professional journals and through professional meetings. The *Ethical Guidelines* (1981) recommends two articles: "The Responsible Use of Tests: A Position Paper of AMEG, APGA, and NCME" in *Measurement and Evaluation in Guidance*, 1972, 5, 385–388, and "Responsibilities of Users of Standardized Tests", APGA, *Guidepost*, October 5, 1978, 5–8.

5. Counselors should note that Section C of APGA *Ethical Standards* deals with the topic of measurement and evaluation. Section C:2 relates to test usage and Section C:10 relates to testing and minority students:

> C:2 In selecting tests for use in a given situation or with a particular client, the member must consider carefully the specific validity, reliability, and appropriateness of the test(s). General validity, reliability and the like may be questioned legally as well as ethically when tests are used for vocational and educational selection, placement, or counseling.
>
> C:10 The member must proceed with caution when attempting to evaluate and interpret the performance of minority group members or other persons who are not represented in the norm group on which the instrument was standardized.

In Section C:2, validity refers to the extent to which a particular test measures what it purports to measure, whereas reliability refers to a test's stability. In administering tests, counselors should carefully review all test manuals and follow all instructions. Even though much information about a particular test can be found in the publisher's test manual, counselors should check the latest edition of Buro's *Mental Measurements Yearbook* (1978) for a complete evaluation. The yearbook discusses such things as the grade level for which the test was designed, the cost of the test, whether machine scoring is available, the reliability and validity of the test, and the construction and standardization of the test. In addition, the reviews often discuss interpretative and other problems related to a particular test.

Section C:10 of the APGA Ethical Standards is consistent with the *Hobson* case discussed earlier. Both serve as a reminder that testing instruments may discriminate against minority groups unless such groups are represented in the norm group for standardization of a particular test. Otherwise, minority groups are compared to white, middle Americans who have different socioeconomic backgrounds and, in some cases, different language.

Conclusion

Court rulings and laws have indicated that tests should not result in the discrimination of students because of sex, race, or

handicaps. The courts have ruled that test scores should not be misused by educators and that the instruments, themselves, should not discriminate. Because school counselors have a major role in testing, they should keep up with the laws and court cases pertaining to testing. Unfortunately, legal journals, court cases, and laws are difficult for counselors to access. Consequently, this article has summarized some legal issues related to testing and discussed their implications for school counselors.

References

American Personnel and Guidance Association. *Ethical Standards*, 1981.

Birk, J. M., Tanney, M. F., & Cooper, J. F. A case of blurred vision: Stereotyping in career information illustrations. *Journal of Vocational Behavior*, 1979, *15*, 247–257.

Brown v. Board of Education, 347 U.S. 483 (1954).

Buros, O.K. (Ed.). *Mental Measurements Yearbook* (8th ed.). Highland Park, N.J.: Gryphon Press, 1978.

Debra P. v. Turlington, 644 F.2d 397 (1981).

Donahue, T.J., & Costar, J.W. Counselor discrimination against young women in career selection. *Journal of Counseling Psychology*, 1977, *24*, 481–486.

Donlon, T.F., Ekstrom, R.B., & Lockheed, M.E. The consequences of sex bias in the content of major achievement test batteries. *Measurement and Evaluation in Guidance*, 1979, *11*, 202–216.

Harway, M. Sex bias in counseling materials. *Journal of College Student Personnel*, 1977, *18*, 57–63.

Hobson v. Hansen, 269 F. Supp. 401 (D.C., 1969).

Hoffman v. Board of Education, 410 N.Y.S. 2d 99 (New York, 1978) and 424 N.Y.S. 2d 376, 1976.

Implementing Title IX: The HEW regulations. *University of Pennsylvania Law Review*, 1976, *3*, 806–830.

Kamin L. Social and legal consequences of I.Q. tests as classification instruments: Some warnings from our past. *Journal of School Psychology*, 1975, *13*, 317–323.

McCarthy, M.M., & Thomas, S.B. The rights to an education: New trends emerging from special education litigation. *NOLPE School Law Journal*, 1977, 78–87.

Mills v. Board of Education, 348 F. Supp. 866 (D.C., 1972).

Moses v. Washington Parish School Board, 456 F. 2d 1285 (Fifth Circuit, 1972, 409 U.S. 1013, 1972).

PEER (Project on Equal Education Rights). Summary of the regulation for Title IX education amendments of 1972. Washington, D.C.: Office for Civil Rights, U.S. Department of Health, Education, and Welfare, 1975.

Pennsylvania Association for Retarded Children (P.A.R.C.) v. Commonwealth, 343 F. Supp. 279 (Pa. 1972).

Ryland, W. H. Title IX Regulations. In *Attorneys General's Conference on School Law, Transcript of Proceedings*. Conference presented in Va., July 26, 1975.

Sauter, D., Seidl, A., & Karbon, J. The effects of high school counseling experience and attitudes toward women's role on traditional or nontraditional career choice. *The Vocational Guidance Quarterly*, 1980, 28, 241–249.

86 Stat. 373.

88 Stat. 514.

89 Stat. 773.

Talbutt, L. *Law and Virginia Public School Counselors*. Unpublished dissertation, Virginia Polytechnic Institute and State University, 1979.

Libel and Slander: A Potential Problem for the 1980s

Lou Culler Talbutt

In today's legal climate, counselors face the potential for litigation in a number of areas. One such area is libel and slander. Yet, few current professional articles deal with this topic. In order to guard against such litigation, counselors should be familiar with issues regarding this area and should follow professional guidelines for avoiding legal pitfalls. The APGA *Ethical Standards* (1981) and ASCA Position Statements (1976) provide such guidelines. This article addresses some key issues related to libel and slander and offers practical recommendations for counselors.

Both libel and slander refer to the defamation of a person's character or reputation. Historically, libel has meant defamation expressed in written form, whereas slander is expressed by word of mouth. Alexander, Corns, and McCann (1969) offered the following definition and explanation:

> Slander and libel consist of false and intentionally published or communicated statements . . . If the statement is communicated by word of mouth or gestures, it is known as slander. If it is communicated in writing, printing, or pictures, it is libel. Simply stated, libel is written defamation and slander is oral defamation. (p. 325)

The necessary elements for a tort of libel and slander are:

> (1) a false statement concerning another was published or communicated; (2) the statement brought hatred, disgrace, ridicule or contempt on another person; (3) damages resulted from the statement. (p. 325)

Educators, including counselors would be likely to face litigations for libel and slander if these three factors were present.

Outlook for the 80s

Burgum and Anderson (1975) wrote that there are few court cases involving libel and slander in education; however, they reminded school counselors that they have "no more right to defame a student than any member of society has a right to defame any other member" (p. 71). Are libel and slander, then, likely areas of litigation for counselors in the 80s? Hummel and Talbutt (1980) wrote, "There are several clues which strongly suggest that counselors may face more litigation in the future" (p. 2). Even though the authors were referring to all types of litigation, libel and slander would certainly be included. Counselors should be aware of the possibilities of lawsuits for defamation arising from their work. Killian (1970) identified three examples that illustrate such risks today:

> (a) talking on the telephone about a child's mental test score; (b) telling a bystander in the office about a boy's failing grade; and (c) relaying information about a student to a third party when it is clearly not a professional obligation. (p. 423)

The fact that there has been little such litigation in the past is no assurance for the future. Hummel and Talbutt wrote, "More than at any time in the history of counseling, counselors must know their legal boundaries and responsibilities" (p. 2). Counselors, because of the nature of their work, have many opportunities for defamation that could result in litigation. First, counselors are privy to conversations, records, and personal information. Second, their jobs require that they communicate with a range of individuals who may pressure them to reveal confidential information. The misuse of personal information, whether intentional or unintentional, could result in libel and slander charges.

Historical Court Cases and Their Implications

Even though case law for school counselors regarding libel and slander is limited, several historical court cases dealing with educators have established certain implications significant for counselors today. In *Baskett v. Crossfield* (228 S.W. 673, 1921), a college president was charged with libel because of two letters he wrote to the father of a student. The letters explained that Baskett had

been asked to withdraw from college for indecently exposing himself from the window of his dormitory room. In ruling in favor of the president, the court concluded that the letters were written in good faith. Also, the court pointed out that the burden was on the plaintiff to show malice. The president, acting in an official capacity, had qualified privileged communication and in the absence of malice was found not guilty of defamation.

In a similar libel suit, *Kenny v. Curley* (Alabama, 93 So. 34, 1923), action was brought on behalf of a student against the school principal, medical director, and dean of women for libelous letters written to the parents. Action was based on statements pertaining to the student's having a venereal disease and "not living right." The Alabama Supreme Court concluded that no malice existed, and reversed the lower court ruling that had awarded the plaintiff damages.

In another case concerning the official report of a psychologist, *Iverson v. Frandsen* (Tenth Circuit, 237 F. 2d. 898, 1956), libel charges were placed against a psychologist for language used in a psychological report. The report stated that the plaintiff's "intelligence quotient . . . classified her as 'feeble-minded,' at the high grade moron level . . ." (pp. 899–900). The court reasoned that the report "though qualifiedly privileged, was positively free from any actionable malice whatsoever" (p. 900). The court pointed out that the psychologist had followed standard procedures and concluded: "It was a professional report made by a public servant in good faith, representing his best judgment, and therefore could not be maliciously false" (p. 900).

These court cases suggest recommended behavior for counselors. First, counselors should always act in good faith and keep their communications free from malice. Second, counselors should report student behavior objectively and factually and should avoid psychological jargon that can be misinterpreted. Butler, Moran, and Vanderpool (1974) warned counselors that "anecdotal reports should be stripped to the bare facts and devoid of value judgments" (p. 42). Third, communications should be made in answer to a request and made only when such a duty exists. Fourth, counselors should believe the communication to be true and should not go beyond the necessary facts. Also, counselors are reminded against communicating in the presence of uninvolved parties.

Along with understanding the danger for legal problems regarding libel and slander, counselors must also understand the two common defenses for defamation. The historical court decision in *Basekett v. Crossfield* (228 S.W. 673, 1921) identified these two

defenses, truth and privileged communication. Truth is a defense unless the statements are malicious. Counselors should obviously act in good faith and be truthful. Ware (1971) concluded that counselors who follow ethical standards would probably meet the legal standards of good faith.

A second defense for defamation is privileged communication. Marsh and Kinnick (1970) defined absolute privileged communication as "unconditional" and wrote that it applied to "official proceedings of legislative and judicial agencies" (p. 363). They maintained, however, that conditional privilege, the type that counselors may possess, must meet certain conditions, such as "absence of malice, fair comment, and official status." (p. 363). The court in *Baskett v. Crossfield* also suggested that the communication should not go beyond the facts requested and that the party should believe the communications to be true. Ware (1971) offered the following explanation for privileged communication:

> Communications made to third persons in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a duty, is qualifiedly privileged if the communications are made to a person having a corresponding interest or duty whether the duty is legal or only social or moral. (p. 308)

Ware also explained two limitations of the privileged relationship rule. First, communications should not be made in front of others who do not possess a similar interest or duty. And, second, the privilege is stronger if the communication is made at the request of another. For example, a school counselor could report to a school principal or other school officials and be covered by the privileged communication rule, but the counselor could not slander a student in front of other students, the public, or other professionals not involved with the student (Ware, 1971).

Conclusions

This article has identified a number of problems related to the counselor's role regarding libel and slander. Counselors should remember their professional guidelines as well as keep in mind the implications of the above court cases. In addition to APGA *Ethical Standards* (1981), which address confidentiality, the American School Counselor Association (1976) presented a position state-

ment on student records that addressed many of the issues identified in this article. These guidelines, if followed, should help counselors avoid legal problems related to libel and slander.

1. Counselors should maintain confidentiality unless there is danger to the client or others, or unless the counselor has a legal obligation to testify in a court of law. Section B-2 of *Ethical Standards* (1981) stated that,

> The counseling relationship and information resulting therefrom be kept confidential, consistent with the obligations of the member as a professional person.
>
> Section B-4 Counseling Relationship.
>
> When the client's condition indicates that there is clear and imminent danger to the client or others, the member must take reasonable personal action or inform responsible authorities. (American Personnel and Guidance Association, 1981)

2. Counselors should not reveal confidential information over the telephone. Guideline 9 of the ASCA Position Statements (1979) explained: "Counselors must not discuss matters over the telephone. A counselor should insist that a request for information be made in writing on official stationery" (p. 287).

3. Counselors should allow only appropriate individuals access to confidential information. Guideline 5 of the ASCA Position Statement (1976) stated: "Counselors must be concerned about individuals who have access to confidential information. Counselors must adhere to PL 93-380."

4. Counselors should assume responsibility for educating other staff members in the school about the privacy rights of students. Guideline 6 of the ASCA Position Statement (1976) stated: "All faculty and administrative personnel should receive inservice training concerning the privacy rights of students. Counselors should assume the primary responsibility for educating school personnel in this area" (p. 287).

5. Counselors should act in good faith at all times regarding confidential information about students. Such information should not be reported to uninvolved parties or revealed in front of those not professionally involved. Counselors who act out of malice or display improper behavior may be subject to libel or slander damages. Pertaining to privileged communication as a defense against libel or slander, Guideline 11 of the ASCA statement (1976) sated:

> Communications made in good faith concerning a student may be classified as privileged by the courts, and the communicating parties will be protected by law against legal actions seeking damages for libel or slander. Generally, it may be said that an occasion of this particular privilege arises when one acts in the bona fide discharge of a public or private duty. This privilege may be abused or lost by malice, improper or unjustifiable motive, bad faith, or excessive publication. (p. 288)

References

Alexander, K., Corns, R., & McCann, W. *Public school law*. St. Paul, Minn.: West Publishing Co. 1969.

American Personnel and Guidance Association. *Ethical Standards*. 1981.

ASCA Position Statements. *School Counselor*, 1976, 23, 281–288.

Baskett v. Grossfield, 228 S.W. 673 (Ky., 1921).

Burgum, T., & Anderson, S. *The counselor and the law*. Washington, D.C.: APGA Press. 1975.

Butler, H.E., Jr., Morgan, K.D., & Vanderpool, F.A. Legal aspects of student records. *School Psychology Digest*, 1974, 3, 31–43.

Iverson v. Frandsen, 237 F. 2d 898 (Tenth Circuit, 1956).

Kenny v. Gurley, 95 So. 34 (Ala., 1923).

Killian, J.D. The law, the counselor, and student records. *Personnel and Guidance Journal*, 1970, 48, 423–432.

Marsh, J.J., & Kinnick, B.C. Let's close the confidentiality gap. *Personnel and Guidance Journal*, 1970, 48, 362–365.

Hummel, D., & Talbutt, L. Message from the guest editors. *Virginia Personnel and Guidance Journal*, 1980, 8, 2.

Ware, M. The law and counselor ethics. *Personnel and Guidance Journal*, 1971, 50, 305–310.

Current Legal Trends Regarding Abortions for Minors: A Dilemma for Counselors

Lou Culler Talbutt

In the middle and late 1970s, professional journals addressed the counselor's role in abortion counseling in light of U.S. Supreme Court rulings granting minors the right to abortions. Several court cases determined that statutes requiring parental permission for minors to obtain abortions were unconstitutional.

Although there have always been certain unclear areas regarding the counselor's role in abortion counseling, the legal rights of minors seem clear. Two U.S. Supreme Court cases, ***Bellotti** v. **Baird*** (1979) and ***H. L. Etc. Appellant** v. **Scott M. Matheson*** (1981), indicated that parents may be legally notified about abortions of minors in some situations.

More recently, in June 1983, the U.S. Supreme Court restated its position on abortion in three court decisions—***City of Akron** v. **Center for Reproductive Health**, **Planned Parenthood Assn. of Kansas City, Mo., Inc.** v. **Ashcroft***, and ***Chris Simopoulos, Appellant** v. **Virginia***. States may not require that all second-trimester abortions be performed in a hospital, may not impose a 24-hour waiting period, may not require that physicians discuss the fetus as "a human life," and may not impose absolute parent consent for minors (51 LW 4767—4791). Clearly, the U.S. Supreme Court reaffirmed that abortions are constitutional for both adults and minors.

What then should be the counselor's legal responsibility to the parents of minors? Is the client the only concern of the counselor? Can parents of minors sue counselors for not informing them about the decisions of minors? This article discusses pertinent court cases dealing with abortion and the counselor's role in abortion. It concludes with some practical recommendations for counselors on abortion counseling for minors.

In a study on the medical rights of minors, Talbutt (1980) wrote, "There are still unresolved issues on which counselors need direction" (p. 406). At the same time, Talbutt called for guidelines from professional organizations to help counselors in abortion counseling for minors. Since that study, the previously mentioned court cases have clouded the issue even more.

Court Cases

A number of court cases, including U.S. Supreme Court decisions, have involved abortions. In *Roe v. Wade* (1973), the U.S. Supreme Court ruled that a Texas law restricting legal abortions to those who are needed for saving a mother's life was in violation of the Due Process Clause of the Fourteenth Amendment. With this historical case, the legal right to abortions was expanded. The court determined that women had a legal right to terminate a pregnancy for reasons other than saving their own life.

In *Doe v. Bolton* (1973), the U.S. Supreme Court declared that a Georgia statute requiring certain hospital requirements for abortions was unconstitutional. The Gerogia statute required a review committee, consent by two physicians, and residency in the state before a woman could obtain an abortion. The *Doe* decision expanded the abortion rights of women because hospitals and clinics became more accessible for obtaining abortions.

A number of cases have dealt with minors and abortions. The Supreme Court of Washington, in *State of Washington v. Koome* (1975), determined that a statute requiring unmarried minors to have parental consent prior to abortion was an invasion of privacy rights and that it discriminated between types of women.

> We hold that this statute too broadly encumbers the right of unmarried minor women to choose to terminate pregnancy, and unjustifiably discriminates between similarly situated groups of women in terms of their right to obtain a legal abortion. (p. 262)

In *Planned Parenthood v. Danforth* (1976), the U.S. Supreme Court ruled that a Missouri law requiring consent by a parent in the case of an unmarried minor prior to an abortion was unconstitutional. Citing *Roe v. Wade* (1973), the court concluded:

> The state may not constitutionally impose a blanket parental consent requirement . . . as a condition for an

> unmarried minor's abortion during the first 12 weeks of her pregnancy for substantially the same reasons as in the case of the spousal consent provision, there being no significant state interests . . . (p. 55)

More recently, *Bellotti v. Baird* (1979) struck down a Massachusetts statute that required minors to obtain parental consent prior to an abortion. The U.S. Supreme Court concluded:

> We therefore conclude that if the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained.
>
> A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parent's wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests. In sum, the procedure must ensure that the provision requiring parental consent does not in fact amount to the "absolute, and possible arbitrary, veto" that was found impermissible in *Danforth*.

The *Bellotti* decision opened the door for statutes to legally require the notification of parents of minors about abortions *if* an alternative is provided. The court's conclusion recognizes that there are times when a minor may be mature enough to make a decision about abortion without parental consent, and in such situations, statutes requiring parental permission must provide an alternative procedure wherein minors can obtain permission from an officer of the court or other appropriate person.

In *H. L. Etc. Appellant v. Scott M. Matheson* (1981), the U.S. Supreme Court seemed to shift its direction by upholding a state law requiring physicians to notify parents of minors about abortions under certain conditions. The court decided that a state may make the notification requirement if the girl depends on her parents, when she is not emancipated, and when she had made no claim that she is mature enough to make the decision alone or that her relationship with the parents might be seriously affected by such notification. This decision certainly indicates that physicians and possibly other professionals have responsibilities for notifying par-

ents of minors about abortions in the four situations stated by the court.

Clearly, minors have the right to abortions according to several *U.S. Supreme Court decisions. Yet conflicts created by the exact* case discussed in the previous paragraph cause some uncertainty for counselors and other professionals working with minors.

Counselor's Role in Abortions

In defining the role of the school counselor with respect to abortion, Duncan and Moffett (1974) explained that counselors should establish a setting for clients to examine feelings and evaluate alternatives. They warned counselors against imposing their views and attitudes on clients.

Walleat (1975) summarized the counselor's responsibilities into four areas. First, counselors should view abortion in relation to the student's total development rather than a crisis situation. Second, counselors should work in conjunction with other community and school programs. Third, counselors should help students "process" information. Finally, counselors should help students use information about abortion, even when schools fail to supply that information.

Walleat also emphasized that there were possible legal and ethical issues regarding schools providing abortion information. The extent to which schools can or should provide abortion information to minors is unclear. For example, do schools display information on abortion clinics openly? Is the information held discreetly for students requesting it? Can parents of minors legally object to schools' disseminating information about abortion? Can the dissemination of information be interpreted as encouraging abortions? These questions should be addressed by the professional associations to clarify the school counselor's role in disseminating abortion information.

Burgum and Anderson (1975) made some recommendations to help counselors avoid lawsuits regarding abortions. They suggested that counselors give advice only in those areas in which they are competent according to their education and work experience. The authors concluded, "Referring a counselee to a clinic's care is the wise, commonsense course for a counselor to follow" (p. 52). They also wrote that counselors who too "vociferously encourage abortion" (p. 193) or those who "negligently interfere with

the parents' right to advise a minor" (p. 193–194) may face legal difficulties.

In view of the proposed legislation and legal shift toward *parental notification about abortions of minors*, counselors of minors should strongly encourage their clients to discuss their situations with parents. The major questions remaining are: How far must counselors go in providing information to parents of minors? Is the legal responsibility strong enough to require counselors to break confidentiality under certain conditions? Unfortunately, until a major court case or legislation addresses these questions, the school counselor's role is undefined. Because parental notification about abortion for minors is unclear, professional guidelines are urgently needed to aid counselors.

Professional counseling groups should address the unresolved issues in a position paper or other materials. Until such time, the concluding recommendations should be of value to counselors.

Concluding Recommendations

Counselors should note that they can face litigation if they go beyond their professional training and skill in abortion counseling. For example, counseling regarding medical or serious psychological problems related to abortions should be left to medical and psychiatric personnel. This is consistent with the *Ethical Standards* (APGA, 1981). According to Section B:10 on the counseling relationship:

> If the member determines an inability to be of professional assistance to the client, the member must either avoid initiating the counseling relationship or immediately terminate that relationship. In either event, the member must suggest appropriate alternatives. . . (APGA, 1981)

Counselors should urge minors to discuss abortion plans with parents and involve families in the counseling process, if possible. Counselors should be familiar with laws and current court rulings that have implications for abortion counseling. Professional awareness through journals, conferences, and workshops is necessary for counselors to be well informed.

Counselors should consider the social mores of the local community. Not only do laws change, but attitudes change. Regardless of counselors' personal views, they must be objective and aware

of and accepting of attitudes that are different from their own. Counselors should be aware that they can face legal problems if they impose their views and attitudes on minors regarding abortions. The final decision on abortion is for the client, not the counselor. The counselor's role is to provide the setting for clients to explore feelings and alternatives and to examine information.

Counselors should work through their national, state, and local professional organizations for directions and guidelines on abortion counseling and dissemination of abortion information for minors. Counselors working with supervisors and department chairpersons should establish general procedures for dealing with abortion counseling. Such procedures would enable counselors to deal more effectively with abortions and prevent a "crisis" type approach. Procedures could include steps for involving appropriate family members, local referral agencies, and school resources.

Finally, counselors should be knowledgeable about appropriate referral agencies dealing with abortions. This recommendation is also consistent with the *Ethical Standards* (APGA, 1981). According to Section B:10 on the counseling relationship, "The member must be knowledgeable about referral resources so that a satisfactory referral can be initiated . . ." (APGA, 1981).

References

APGA. (1981). *Ethical standards*. Falls Church, VA: American Personnel and Guidance Association.

Bellotti v. Baird, 47 LW 4969 (July 2, 1979).

Burgum, T., & Anderson, S. (1975). *The counselor and the law*. Washington, DC: APGA Press.

City of Akron v. Center for Reproductive Health, Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft, Chris Simopoulos, Appellant v. Virginia, 51 LW 4767–4791 (June 1983).

Doe v. Bolton, 410 U.S. 179 (1973).

Duncan, J., & Moffett, C. (1974). Abortion counseling and the school counselor. *The School Counselor, 21*, 188–195.

H. L. etc. Appellant v. Scott M. Matheson, 101 S.Ct. 1164 (1981).

Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

Roe v. Wade, 410 U.S. 113 (1973).

State of Washington v. Koome, 530 P.2d 260 (1975).

Talbutt, L.C. (1980). The medical rights of minors: Some answered and unanswered questions. *The School Counselor, 27*, 403–406.

Walleat, P.L. (1975). Abortion information: A guidance viewpoint. *The School Counselor, 22*, 338–341.

Counselor Liability and the Duty To Warn: Selected Cases, Statutory Trends, and Implications for Practice

Barbara Herlihy and *Vernon Lee Sheeley*

The authors review selected case law and recently enacted state statutes pertinent to "the duty to warn." Guidelines for practice in dealing with dangerous clients are offered.

Since the California court ruling in the *Tarasoff* appeal (*Tarasoff v. Regents of University of California*, 1976) 12 years ago, mental health professionals have been seriously concerned about (a) the implications of that and subsequent judicial rulings for the "duty to warn and protect," and (b) their potential liability in court actions (Denkowski & Denkowski, 1982; Knapp & VandeCreek, 1982; Mabe & Rollin, 1986; Mappes, Robb, & Engels, 1985; Snider, 1985; Stude & McKelvey, 1979; VandeCreek & Knapp, 1984; Wise, 1978). In our increasingly litigious society, the legal notion of civil liability for personal injury has been expanding and now exceeds the traditional risk limits of a generation ago. The emerging attitude that "someone is injured, therefore someone must pay" suggests that loss need not lie with the victim. Legislators, judges, and juries have aligned themselves with this social impulse by pushing out the frontiers of responsibility.

The California Supreme Court, concluding that a psychotherapist who treats a potentially violent or dangerous client "bears a duty to use reasonable care to give threatened persons such warnings as are essential to avert foreseeable dangers" (*Tarasoff II*, p. 339), enmeshed mental health professionals in this emerging trend. The American Psychological Association (APA) Committee on Legal Issues listed outcomes of 50 malpractice lawsuits brought from 1947 to 1984 against mental health care providers as defendants for violent acts to clients. The final disposition of 18 cases decided before *Tarasoff I* (1974) indicated that plaintiffs prevailed in 5 cases

(28%), and defendants were awarded in 13 (72%). The 32 cases decided since *Tarasoff I* reflect the emerging trend: Plaintiffs were successful in 20 cases (62.5%), whereas defendants prevailed in only 12 (37.5%) (Committee on Legal Issues, 1985).

Counselors, as a relatively new and still maturing professional group, may not have extensive experience with involvement in lawsuits. Nonetheless, they have shared psychologists' concerns about the lack of clear guidelines for determining whether, when, and how to exercise the duty to warn and protect. They have experienced anxiety and confusion regarding whether this duty, if it exists, is an ethical obligation, a legal obligation, or both.

Codes of ethics are unclear on this issue. The *Ethical Standards* of the American Association for Counseling and Development (AACD) state that: "When the client's condition indicates that there is a clear and imminent danger to the client or others, the member must take reasonable personal action or inform responsible authorities" (AACD *Ethical Standards*, 1981, Section B.4, p. 1). This standard has been variously interpreted as (a) a statement that counselors are obligated to pursue threats to others reported by clients (DePauw, 1986), and (b) silent on the issue of the duty to warn (Mabe & Rollin, 1986). Future revisions of ethical codes may include specific criteria for warning intended victims of clients, as has been recommended by Mappes, Robb, and Engels (1985). Although such a clarification would be helpful, counselors cannot rely solely on ethical standards. Rulings made by legal forums also have implications for the duty to warn and for potential liability. This article first reviews legal rulings, statutes, and analyses, and then suggests guidelines for counseling practice that may be drawn from this review.

Legal rulings relevant to the counseling profession may arise from two major sources: case law and statutory law. Case law pertains to rulings in individual court cases; its importance lies in its potential to set precedents for future cases and in the possibility that, cumulatively, it may form a rationale for future statutory enactments. Statutory law is enacted by the legislative branch of government. Statutory laws relating to therapist liability have been enacted in some states, and statutes granting privileged communication between therapists and clients may also have implications for the duty to warn or protect.

Review of Selected Cases

The first *Tarasoff* opinion (1974) was vacated after a rehearing and was replaced by *Tarasoff II* in 1976. In the wake of

this well-publicized ruling, considerable case law was established regarding clients who pose a danger to others. In this review of selected cases, no attempt is made to delineate differences in the "duty to warn" among the various helping professionals (this generic term includes psychiatrists, psychologists, community mental health counselors, child, marriage and family therapists, and social workers). The *Tarasoff II* ruling applied to "psychotherapists," a designation that has left these boundaries unclear in jurisdictions outside California. In this article, cases are discussed according to Kelleher's (1984) suggestion that courts rely upon a certain criterion to determine therapist liability: The potential victim's identifiability. Kelleher distinguished among three types of situations: the presence or absence of a readily identifiable victim, the existence of a specific foreseeable victim, and foreseeable danger in general.

Identifiable Victims

In both *Tarasoff II* and the case that followed it in New Jersey, *McIntosh* v. *Milano* (1979), the courts required that there be an identifiable potential victim before liability for failure to warn could be imposed. As has been noted by Knapp and VandeCreek (1982), the controlling facts in *McIntosh* were similar to those in *Tarasoff*. Dr. Milano's patient had a background of hostile feelings toward his former girlfriend and had revealed to the therapist that he had previously shot at her car with a BB gun and wanted to see her suffer. The patient, while still in therapy, obtained a pistol and killed the ex-girlfriend. The court imposed liability, therefore implying that a therapist may have a duty to take reasonable steps to protect an intended or potential victim.

A court of appeals in Michigan used similar reasoning in upholding a lower court's judgment against a psychiatrist in *Davis* v. *Lhim* (1983). In this case, the psychiatrist released a patient, who had a history of psychological disorders, into the care of the patient's mother. The patient later fired a shotgun and killed his mother while she was attempting to restrain him. The siblings of the mother sued the psychiatrist for negligent discharge of the patient, and the court upheld the principle that the psychiatrist owed a duty of reasonable care to persons who are readily identifiable as foreseeably endangered by a patient. The jury award of $500,000 seemed to support mental health providers' concern that they may be viewed as "deep pocket" defendants for victims of violent crime.

Applying the same principle of identifiability, courts have in at least four cases refused to impose liability in the absence of a readily identifiable victim. In *Thompson v. County of Alameda* (1980), a California court ruled against the parents of a young murder victim. A juvenile, while in custody in a county facility, made a threat to take the life of a young child (although he did not specify a particular child) in a certain neighborhood. After the juvenile was released, he killed a young boy in that neighborhood. The child's parents were denied a cause of action against the facility that had released the murderer because threats had not been directed at any specific person. Although a warning to the limited group of parents in the neighborhood who had young children might possibly have averted the killing and been an effective warning, the court denied liability. The significance of *Thompson* is its clarification of the requirement that the victim be "readily identifiable" in order for the *Tarasoff* duty to apply.

A federal district court used similar reasoning in refusing to impose liability in *Leedy v. Hartnett* (1981). In this situation, a patient who had been in and out of psychiatric hospitals for 20 years went to live with his friends, the Leedys, after he had been released from the hospital. The patient was known to be violent when intoxicated. He later became intoxicated while drinking with the Leedys and assaulted them. The court held that the patient posed no greater threat to the Leedys than to anyone else who might have been present when he became violent, and refused to impose liability because the Leedys were not readily identifiable victims.

In *Brady v. Hopper* (1983), suit was brought against the therapist of John Hinckley, Jr., who injured Brady while attempting to assassinate President Reagan in 1981. The court dismissed the case because Hinckley had not made specific threats toward anyone in particular, and thus harm to the plaintiff was not foreseeable.

Finally, a California court refused to impose liability in *Marquardis v. Superior Court of San Mateo County* (1980) when the identity of the intended victim was unknown. In this case, a hospital released a boy into the custody of his parents, whom he later assaulted with a hammer. The court, although acknowledging that the hospital's therapist might have been able to determine on reflection that the parents were potential victims, recognized that the therapist was not obligated to take extreme measures to learn the intended victims' identities.

These rulings indicate that therapists must have adequate information about a client's potential to harm *certain* victims before they have the duty to warn those victims.

Specific Foreseeable Victims

Courts in some jurisdictions have extended the duty to warn to "foreseeable" victims who may not be readily identifiable by the therapists, but who would be likely targets if the client became violent.

In *Jablonski v. United States* (1983), the Ninth Circuit Court allowed a cause of action to a victim who was foreseeable, although not identifiable. This case involved a client who had a history of violence toward women and whose psychological profile indicated that he would direct his violence against women who were close to him. He lived with a woman who became the victim of his assault. The court, although acknowledging that no threats had been made to any specific individual, reasoned that the victim was a likely recipient of his violence.

In *Hedlund v. Superior Court of Orange County* (1983), the California Supreme Court allowed a cause of action to the son of a woman whom a client had threatened with harm and had later killed in the son's presence. Although no threats had been made against the son, he suffered emotional trauma in witnessing the murder, and was found to be a foreseeable victim. In this case, failure to warn even a third party victim was ruled to be professional negligence.

Foreseeable Danger in General

Confounding the criterion of identifiability or foreseeability, several courts have imposed liability when the danger was to the general public rather than to a particular individual. In *Lipari v. Sears, Roebuck, & Co.* (1980), a former psychiatric patient of a VA hospital purchased a shotgun and then resumed outpatient care. He terminated therapy shortly thereafter against the therapist's advice. Six weeks later he went into a nightclub and began firing a shotgun, killing Dennis Lipari and injuring Lipari's wife. In this case, there was no clear danger of harm to a particular person, nor was there any basis for the therapist to identify a potential victim. Nevertheless, the court broadened the circumstances of therapist liability by ruling against the therapist. The court stated that there were ways other than alerting the victim to act on the duty to warn, such as attempting to detain the patient.

In *Peterson v. State* (1983), the court followed the logic of *Lipari* by imposing on a therapist a duty to control a potentially

dangerous patient. The therapist had released a patient who had drug-related mental problems; later a woman was injured when this patient, under the influence of drugs, negligently collided with her car. The court held that the therapist had a duty to protect anyone who might be a foreseeable victim of his patient's drug-related problems. Because the therapist knew of the patient's tendencies toward drug abuse, yet released him, the therapist could be liable for the injury caused by that patient. Both *Lipari* and *Peterson* imply that the therapist has a duty to keep a patient committed or to secure the commitment of a patient who poses a risk of harm to others.

The findings in a recent case, *Division of Corrections v. Neakok* (1986), suggest that the courts are continuing to refine the guidelines established by earlier cases. In this case, a supervised parolee, who had been mandatorily released from prison 6 months previously, had become intoxicated and shot and killed his teenaged stepdaughter and her boyfriend and raped, assaulted, and strangled to death another woman. The relatives of the three victims brought suit against the State of Alaska, the Division of Corrections, and the parole board, claiming negligence in part for failure to warn the victims. The Alaska Supreme Court, hearing the case on appeal, refused to overturn the lower court's verdict of negligence. The Supreme Court noted that in both *Lipari* and *Peterson* the specific identity of the victim had been wholly unforeseeable. In this case, however, the victims were foreseeable as more than simply members of the general public. The murderer had been released into an isolated community of fewer than 100 residents, one of the victims was the murderer's stepdaughter, and the others were her boyfriend and her aunt. The court stated that because the stepdaughter was foreseeably endangered, her close friends and relatives may also have been within a zone of especially foreseeable victims. Thus the court, although disclaiming any intention that potentially dangerous individuals "be emblazoned with scarlet letters" (p.1131), ruled that the releasing agency may be held liable for failure to warn a foreseeable group of victims.

Other courts continue to grapple with complex issues in attempting to clarify the duty to warn. A number of precedent-setting cases, as discussed above, hinged upon psychotherapists' decisions to release clients from inpatient treatment. A recent case, *Currie v. United States of America* (1986), has particular implications for psychotherapists who treat clients on an outpatient basis. This case involved a Vietnam veteran suffering from post-traumatic stress disorder who entered his former place of employment after being

fired, killed one of his coworkers, and wounded several others. The client had been sporadically attending outpatient group therapy at a VA clinic. In telephone conversations with his therapist, he had threatened harm to his employer and to the therapist. The psychotherapist warned law enforcement authorities and the employer, but concluded in consultation with other clinic staff members that involuntarily committing the client was not feasible under state law.

Suit was brought against the psychotherapy staff for negligence in failing to petition to involuntarily commit the client; this led the court to address the distinction between the duty to commit and the duty to warn. The court, recognizing that there is an inherent conflict between protecting society by confining dangerous persons and protecting the individual patient by giving him the least restrictive environment, acknowledged that both goals probably can never be met in practice. The court sought a compromise by suggesting that a "psychotherapist judgment rule" be applied, in which the court would examine the good faith, consultation sought, and thoroughness of the therapist's decision not to commit a client. Applying this standard, the court ruled that because the therapists' decision not to seek commitment involved serious personal risk to themselves, the therapists had acted in good faith. The claim was then dismissed.

Clarifications and Conflicts in Statutory Laws

The Committee on Legal Issues of the American Psychological Association (APA) has been concerned that the gradual accumulation of case law extending the *Tarasoff* duty, along with reforms in civil commitment laws, has led to a redefinition of the psychotherapist as a predictor of violent behavior, a protector of potential victims, and a "deep pocket" defendant for the victims of violent crime. In response to this concern, the committee has developed a White Paper on the duty to protect (APA, 1985). It contains a model bill to limit psychotherapists' civil liability for the violent acts of mental patients. Bills based on this model, if enacted into law by state legislatures, would override the precedents set by courts and would clarify therapists' legal responsibilities.

Despite this recommendation, legislatures in only four states have enacted statutes that limit therapist liability. Because *Tarasoff* and a number of subsequent cases occurred in California jurisdic-

tions, it is not surprising that California in 1985 was the first state to add to its Evidence Code a section limiting therapist liability. This section states:

> There shall be no monetary liability on the part of, and no cause of action shall arise against . . . a psychotherapist . . . in failing to warn of and protect from a patient's threatened violent behavior or failing to predict and warn of and protect from a patient's violent behavior except when the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims.
>
> If there is a duty to warn and protect under the limited circumstances specified above, the duty shall be discharged by the psychotherapist making reasonable efforts to communicate the threat to the victim or victims and to a law enforcement agency. (California Evidence Code, Civil Code, Section 43.92)

A similar enactment protecting mental health care providers was passed in Colorado in 1986. The language is quite similar to that of the California statute, except that the serious threat of physical violence must be "imminent" and directed against "a specific person or persons," and the duty may also be exercised by "taking other appropriate action including, but not limited to, hospitalizing the patient." In addition to immunity from civil liability, mental health care providers cannot be subject to professional discipline for issuing warnings or making predictions of dangerousness.

A Kentucky statute, also enacted in 1986, imposes more specific conditions for liability. The patient must have communicated to a mental health professional "an actual threat of some specific act." The duty to warn is discharged when the professional makes reasonable efforts to communicate to the victim and to notify police. The Kentucky statute provides for instances when no particular victim is identifiable; in these cases, the professional must attempt to communicate the threat to law enforcement authorities.

A New Hampshire statute, effective January 1, 1987, is unique in that it requires psychologists to warn or protect when there is "a serious threat of substantial damage to real property" as well as to persons. Although the majority of suits have involved injury to persons rather than to property, a recent appeal case opinion in Vermont illustrated that provider liability may extend beyond personal injury. In *Peck v. Counseling Service* (1985), the court ruled

negligence against a health care provider who failed to warn patients that their son (a client) had threatened to burn their barn. The court declared arson a violent act that represented a lethal threat to humans who may have been near. The parents, the plaintiffs, were also found to be 50% comparatively negligent in causing their barn and its contents to be destroyed because they were aware of their son's proclivity to violent behavior.

The New Hampshire statute, although unique in including damage to property, resembles other statutes in that the duty may be exercised by attempting to communicate the threat to the victim, notifying the police, or obtaining civil commitment of the client. Similar bills have been drafted in Florida, Kansas, Louisiana, Massachusetts, and Washington, but have not been enacted into law.

In summary, statutory laws in California, Colorado, Kentucky, and New Hampshire provide therapists covered under those statutes with clear guidelines for dealing with potentially dangerous clients. In some states, however, other statutes, specifically those regarding privileged communication, can create serious dilemmas for conscientious therapists. Therapists breach confidentiality when they exercise the duty to warn third parties who may be endangered by a client. Whereas confidentiality is an ethical standard, its legal counterpart is privileged communication that prohibits therapist disclosure of clients' confidential communications except under certain specified circumstances. Thus, these "exceptions to privilege" should provide guidance regarding the duty to warn.

A Maryland case, *Shaw v. Glickman* (1980), illustrates the dilemma that can be created when statutory law conflicts with precedents established by case law. In this case, a psychotherapy team was leading a group that included a man, his wife, and the wife's lover. The husband subsequently discovered the affair and shot and severely wounded the lover who sued, claiming that the psychotherapy team should have warned him of the danger. The court, stating that there was no basis on which the team could have foreseen the assault, exonerated the psychotherapists. The court's reasoning was similar to that of the courts in *Thompson, Leedy, Brady,* and *Mavroudis,* but is remarkable for the further comments it made regarding privileged communication. The court noted that because Maryland's privileged communication statute does not allow for breaches of confidentiality when the lives of others are threatened, the psychotherapists could not have warned the victim even if they had known about the threat (Knapp & VandeCreek, 1982). Thus, it seems that a literal interpretation of statutes that extend privileged communication without including an exception

for cases of clear and imminent danger to others might actually prevent therapists from warning potential victims.

Licensed professional counselors in some states may be particularly vulnerable to such a dilemma. Of the 18 states that had enacted counselor licensure laws through the summer of 1986, 12 (Alabama, Arkansas, Idaho, Mississippi, Missouri, Montana, Nebraska, North Carolina, Ohio, Oklahoma, Virginia, West Virginia) were found to contain privileged communication provisions (Herlihy & Sheeley, 1987). In Alabama and Arkansas, the statutes guarantee that privileged communication between licensed professional counselors and their clients is the same under law as that between an attorney and client, no exceptions are specified. Because attorney-client privilege statutes typically contain a "future crime exception," however, licensed counselors in those two states are advised to study their respective attorney-client privilege statutes for guidance regarding their duty to warn.

The statutes in three other states make exceptions relevant to the duty to warn. The Mississippi statute makes an exception to privilege "when a communication reveals the contemplation of a crime or harmful act, or intent to commit suicide." The Montana statute stipulates that the counselor "need not treat as confidential a communication otherwise confidential that reveals the contemplation of a crime by the client or any other person or that in his professional opinion reveals a threat of imminent harm to the client or others." In Ohio, one of the conditions under which otherwise confidential communications may be revealed is when "the communication or advice indicated clear and present danger to the client or to others." It should be noted that these provisions do not *require* a licensed professional counselor to breach confidentiality and exercise the duty to warn or protect, they only *allow* the counselor to do so. By contrast, in the states of Idaho, Missouri, Nebraska, North Carolina, Oklahoma, Virginia, and West Virginia, a literal reading of the privileged communication statutes might actually prevent a licensed counselor from warning a potential victim.

Guidelines for Practice

With respect to the duty to warn and protect, both case law and statutory law, with the exception of the four recently enacted state statutes that limit therapist liability, are confusing and unclear, leaving counselors in a quandary. It seems clear that a duty

to warn does exist if, in the counselor's professional judgment, the client is likely to commit a violent act against a third party. Counselors need to exercise care against the tendency to overpredict violence as a means of self-protection; not only are such practices ethically questionable, they provide no real safety. If counselors do overreact and mistakenly deliver a warning to a third party, it is possible that they may be sued by the client for invasion of privacy or defamation. On the other hand, an overcautious approach leading to a failure to warn could in some jurisdictions and in certain circumstances lead to a lawsuit in which the counselor would be held liable. In addition to the legal ramifications, personal and ethical consequences need to be considered. No counselor wishes to be faced with a situation in which a warning was not given and the client's violence resulted in an injury or death to a third party. Counselors might be tempted, given the complexity of the quandary and the seriousness of the consequences of a mistaken judgment, to avoid dangerous clients. It would be a breach of ethics, however, to close the doors of the profession to a segment of the population that clearly needs help (Snider, 1986).

Although no absolute answers can be formulated at this time, it does seem clear that counselors, when they determine that a client poses a danger to others, have a duty to take affirmative steps. Kelleher (1984) suggested that therapists should consider three factors in deciding what steps are reasonable: (a) whether the client is still in treatment or in contact with the therapist, (b) whether the danger is imminent, and (c) whether the client poses a danger to a foreseeable or identifiable victim or to the general public. Kelleher further suggested six possible affirmative duties that have emerged from case precedents. Actions that focus on the client include:

(A) intensifying treatment,

(B) attempting to persuade the client to accept voluntary treatment, and

(C) attempting to secure involuntary commitment.

Alternatives that involve third parties include:

(D) warning the potential victim,

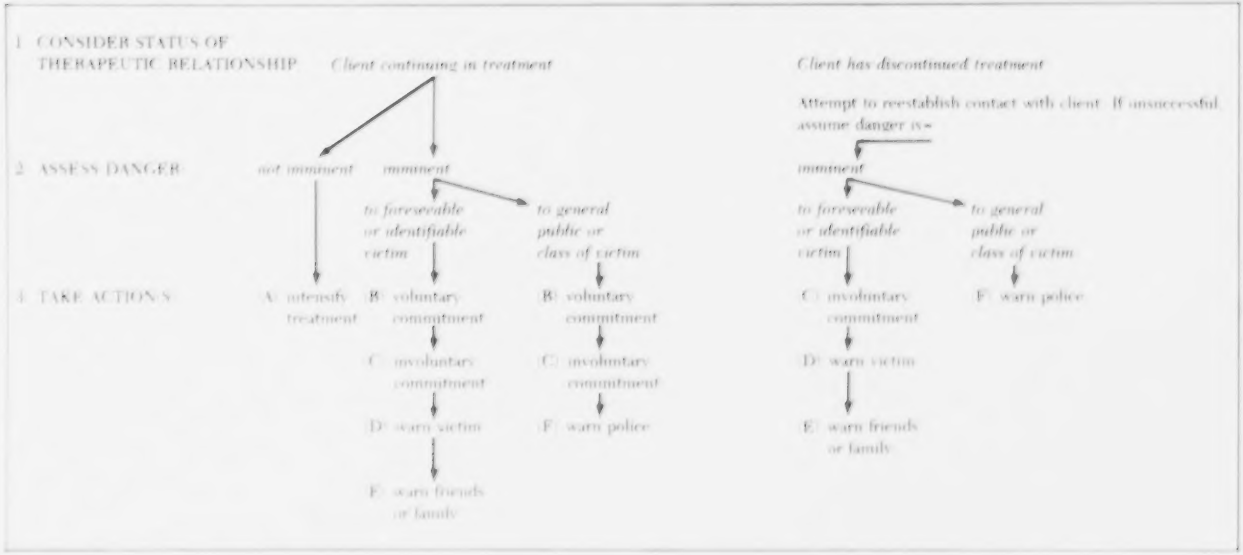
(E) warning family or friends who might apprise the victim of the danger, and

(F) notifying the police.

The factors to consider can be related to the possible affirmative actions to produce a suggested decision-making model, illustrated in Figure 1.

Figure 1

THE DUTY TO WARN AND PROTECT: A SUGGESTED DECISION MAKING MODEL


1. CONSIDER STATUS OF THERAPEUTIC RELATIONSHIP
Client continuing in treatment
Client has discontinued treatment
Attempt to reestablish contact with client. If unsuccessful, assume danger is—
2. ASSESS DANGER:
not imminent
imminent
imminent
to foreseeable or identifiable victim
to general public or class of victim
to foreseeable or identifiable victim
to general public or class of victim
3. TAKE ACTION S:
A: intensify treatment
B: voluntary commitment
C: involuntary commitment
D: warn victim
E: warn friends or family
B: voluntary commitment
C: involuntary commitment
F: warn police
C: involuntary commitment
D: warn victim
E: warn friends or family
F: warn police

The actions included in the model are not intended to be an all-inclusive list. Depending on the specific circumstances of the situation, ethically conscientious therapists may select to take additional steps. Several writers (Denkowski & Denkowski, 1982; Halleck, 1980; Roth & Meisel, 1977; VandeCreek & Knapp, 1984) have suggested further guidelines for therapists who deal with dangerous clients:

1. Keeping in mind that the primary objective should be to keep the client in therapy, deal with the aggression as part of the treatment.
2. To avoid overreacting, remember that clients without a history of violence rarely implement their threats; to be prudent, pursue other options before breaching confidentiality.
3. Take an informed consent approach by securing the client's permission for disclosure and inviting the client to participate in the process, or by contacting the third party in the presence of the client.
4. Attempt environmental manipulations such as having the client get rid of lethal weapons.
5. Be prepared by formulating contingency plans that are derived in consultation with an informed attorney, a local psychiatric hospital, and area law enforcement personnel.
6. Consult with professional colleagues and attorneys who have expertise and experience in dealing with dangerous clients.
7. Keep careful records and document all actions taken.
8. Issue warnings to third parties only as a last resort after actions directly involving the client have been ineffective.
9. If warning a third party is unavoidable, disclose only the minimum amount necessary to protect the victim or the public, stating the specific threat but reserving any opinion or prediction.
10. If consideration is given to seeking involuntary commitment of an outpatient client, act in good faith, consult with colleagues, and thoroughly research applicable laws and standards.
11. Finally, do not practice without professional liability insurance.

VandeCreek and Knapp (1984) have noted that although counselors value both the sanctity of human life and the privacy of the counseling relationship, these values can conflict in situations in-

volving clients who pose a danger to others. Conflicts in accumulated case law and variations in statutory law regarding privileged communication place counselors in a legal, as well as an ethical, quandary. Perhaps the most effective means that counselors can employ to clear this confusion is to lobby for the passage of state statutes that define the limits of counselor liability. In the interim, for counselors in states that lack such statutes, the decision-making model described here may provide a basis for taking responsible action. At this point in the development of the counseling profession, however, there are no absolute answers. In the last analysis, there is no substitute for the counselor's professional clinical judgment in dealing with the conflicting demands of confidentiality versus disclosure.

References

American Association for Counseling and Development. (1981). *Ethical standards*. Alexandria, VA: Author. (Originally published by American Personnel and Guidance Association)

Brady v. Hopper, 570 F. Supp. 1333 (D. Colo. 1983).

Civil Evidence Code, California. §§ 43.92 (1986).

Committee on Legal Issues of the American Psychological Association. (1985, November). *White paper on duty to protect*. Washington, DC: Author.

Currie v. United States of America, Memorandum Opinion, Civil No. C-85-0629-D. United States District Court for the Middle District of North Carolina, Durham Division. (North Carolina, 1986).

Davis v. Lhim, 335 N.W. 2d 481 (Mich. App. 1983).

Denkowski, K.M., & Denkowski, G.C. (1982). Client-counselor confidentiality: An update of rationale, legal status, and implications. *Personnel and Guidance Journal, 60*, 371–375.

DePauw, M.E. (1986). Avoiding ethical violations: A timeline perspective for individual counseling. *Journal of Counseling and Development, 64*, 303–305.

Division of Corrections v. Neakok, 721 P.2d. 1121 (Alaska, 1986).

Halleck, S. (1980). *Law in the practice of psychiatry*. New York: Plenum Medical Book Company.

Hedlund v. Superior Court of Orange County, 34 Cal. 3d 695, 669 P.2d. 41, 194 Cal. Rptr. 805 (1983).

Herlihy, B., & Sheeley, V.L. (1987). Privileged communication in selected helping professions: A comparison among statutes. *Journal of Counseling and Development, 65*, 479–483.

Jablonski v. United States, 712 F.2d. 391 (9th Cir. 1983).

Kelleher, M. (1984). Psychotherapists and the duty to warn: An attempt at clarification. *New England Law Review, 19*, 597–617.

Knapp, S., & VandeCreek, L. (1982). Tarasoff: Five years later. *Professional Psychology, 13*, 511–516.

Leedy v. Hartnett, 510 F. Supp. 1125 (M.D. Pa. 1981).

Lipari v. Sears, Roebuck & Co., 497 F. Supp. 185D (Neb. 1980).

Mabe, A.R., & Rollin, S.A. (1986). The role of a code of ethical standards in counseling. *Journal of Counseling and Development, 64*, 294–297.

Mappes, D.C., Robb, G.P., & Engels, D.W. (1985). Conflicts between ethics and law in counseling and psychotherapy. *Journal of Counseling and Development, 64*, 246–252.

Mavroudis v. Superior Court of San Mateo County, 102 Cal. App. 3d. 594, 162 Cal. Rptr. 724 (1980).

McIntosh v. Milano, 403 A.2d. 500 (1979).

Peck v. Counseling Service, 146 Vt. 61, 499 A.2d. 422 (1985).

Peterson v. State, 671 P.2d. 230 (Wash. 1983).

Roth, L.H., & Meisel, A. (1977). Dangerousness, confidentiality, and the duty to warn. *American Journal of Psychiatry, 134*, 508–511.

Shaw v. Glickman, 415 A.2d. 625 (Md. App. 1980).

Snider, P.D. (1985). The duty to warn: A potential issue of litigation for the counseling supervisor. *Counselor Education and Supervision, 25*, 66–73.

Stude, E.W., & McKelvey, J. (1979). Ethics and the law: Friend or foe? *Personnel and Guidance Journal, 57*, 453–456.

Tarasoff v. Regents of the University of California, 118 Cal. Rptr. 129, 529 P.2d. 533 (Cal. 1974).

Tarasoff v. Regents of the University of California, 113 Cal. Rptr. 14, 551 P.2d. 334 (Cal. 1976).

Thompson v. County of Alameda, 614 P.2d. 728 (Cal. 1980).

VandeCreek, L., & Knapp, S. (1984). Counselors, confidentiality, and life-endangering clients. *Counselor Education and Supervision, 24*, 51–57.

Wise, T. (1978). Where the public peril begins: A survey of psychotherapists to determine the effects of Tarasoff. *Stanford Law Review, 31*, 165–190.

END

U.S. Dept. of Education

Office of Education
Research and
Improvement (OERI)

ERIC

Date Filmed

March 21,1991